Petition

81-885 No.

Office - Supreme Court, U.S.
FILED
NOV 12 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Petitioners,

v.

TEXAS TRADING & MILLING CORP., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES G. SIMMS
Suite 1840
120 Broadway
New York, New York 10271
(212) 962-2000

Counsel for Petitioners

Of Counsel:
KISSAM, HALPIN & GENOVESE
120 Broadway
New York, New York 10271

November 11, 1981

Questions Presented

This case presents questions of first impression with respect to the analysis and interpretation of the Foreign Sovereign Immunities Act of 1976 ("Immunities Act"). The Immunities Act defines the sole and exclusive standards for determining the jurisdictional immunity of foreign states in actions in Federal and State courts. The Court of Appeals has addressed the provisions of the Immunities Act which Congress stated define the most important exceptions to immunity—the exceptions relating to commercial activity of a foreign state. Petitioners respectfully request this Court to settle the following questions:

1. Does the analysis by the Court of Appeals of the provisions of the Immunities Act which define subject matter jurisdiction and personal jurisdiction conflict with the requirements of the Act and the directive of Congress to treat these provisions as integrated and interrelated?

2. With respect to the Court of Appeals' interpretation of the provision of the Immunities Act which defines an exception to immunity where the action is based upon a commercial act by the foreign state having a "direct effect in the United States",

(a) Was it proper for the Court of Appeals to disregard the specific guidelines defined by Congress as applicable to the provision; and

(b) Should the Court of Appeals have considered whether the particular act of breach giving rise to the claims was "governmental" rather than "commercial" activity of the foreign state?

3. In its consideration of personal jurisdiction and the application of due process standards,

(a) Was the Court of Appeals correct in assuming that the Immunities Act incorporates a due process standard co-extensive with constitutionally permitted limits so as to allow a consideration of whether the foreign state is "present" by virtue of "doing business" based upon all of the commercial activity of the foreign state in the United States, including commercial activity unrelated to the subject of the action; and

(b) Does the Court of Appeals' application of due process standards conflict directly with the Ninth Circuit decision in *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion de Costa Rica,* 614 F.2d 1247 (9th Cir. 1980), which presented facts substantially identical to those herein?

4. Was the Court of Appeals correct in concluding that jurisdiction exists pursuant to the Immunities Act with respect to respondents' claims against petitioners which arise out of agreements made and to be performed outside the United States, as to which the only contact with the United States resulted from the fact that respondents are American corporations who requested to be paid in the United States?

List of All Parties

The proceeding in the Court of Appeals involved six separate actions which were submitted and argued jointly. The judgment which is sought to be reviewed concerns four of those actions, and the parties thereto were:

— Federal Republic of Nigeria ("Nigeria"),

— Central Bank of Nigeria ("Central Bank"),

— Texas Trading & Milling Corp. ("Texas"),

— Decor by Nikkei International, Inc. d/b/a Nikkei International, Inc. ("Nikkei"),

— East Europe Import-Export, Inc. ("East Europe"), and

— Chenax Majesty, Inc. ("Chenax").

Nigeria and Central Bank are the petitioners herein. Texas, Nikkei and East Europe are the respondents. Nigeria and Central Bank do not seek review with respect to the judgment as it involved Chenax.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
List of All Parties	III
Table of Authorities	VII
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
Point I—The Court of Appeals' analysis of the provisions of the Immunities Act defining subject matter and personal jurisdiction fails to comply with the requirements of the Immunities Act and the directive of Congress to treat these provisions as integrated and interrelated	8
A. The provisions of the Immunities Act defining subject matter and personal jurisdiction	8
B. The analysis by the Court of Appeals	10
Point II—The Court of Appeals disregarded the intent of Congress in its interpretation of the "direct effect" provision of §1605(a)(2) and defined no clear or meaningful standard for the application of the provision	11

PAGE

Point III—The Court of Appeals failed to consider whether the particular act of breach was "governmental" or "commercial" activity of the foreign state 16

Point IV—The Immunities Act does not incorporate a due process standard co-extensive with constitutionally permitted limits 18

Point V—The Court of Appeals decision with respect to due process conflicts directly with a recent Ninth Circuit decision in an action which presented substantially identical facts 20

TABLE OF AUTHORITIES

PAGE

Cases:

Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976) 17

Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979) 14

Chicago Bridge v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980) 14

Decor by Nikkei International, Inc. v. Federal Republic of Nigeria, 497 F. Supp. 893 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 390 (2d Cir. 1981) 1, 5, 14, 15

East Europe Domestic International Sales Corp. v. Terra, 467 F. Supp. 383 (S.D.N.Y.), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979) 15

Floyd J. Harkness Co. v. Amezcua, 60 Cal. App. 3d 687, 131 Cal. Rptr. 667 (1976) 21

Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979) 14, 19, 20

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 7, 18, 21, 22

National American Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979) 15

Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966) 16

Reale International, Inc. v. Federal Republic of Nigeria, 647 F.2d 330 (2d Cir. 1981) 6

PAGE

Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 500 F. Supp. 320 (S.D.N.Y. 1980), *rev'd*, 647 F.2d 300 (2d Cir. 1981) 1, 4, 5, 12, 14, 15, 17, 20

Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980) 11, 20–21

Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C.Cir. 1979) 14

Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981) 5, 6, 14, 19, 20

Victory Transport, Inc. v. Comisaria General, 336 F. 2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) 15–16

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 7, 18, 21

Statutes:

Foreign Sovereign Immunities Act of 1976, *codified at* 28 U.S.C. §§ 1330; 1332(a)(2)-1332(a)(4); 1391 (f); 1441(d); and 1602-1611 ..... *Passim*

28 U.S.C. § 1330(a) 2, 4, 8, 13, 16
28 U.S.C. § 1330(b) 2, 4, 8
28 U.S.C. § 1603(b) 6
28 U.S.C. § 1603(d) and (e) 2–3
28 U.S.C. §§ 1605-1607 ..... 8, 10, 19
28 U.S.C. § 1605(a)(2) ..... *Passim*
28 U.S.C. § 1608 8
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332(a)(2) 21

PAGE

Legislative Materials:

House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R.Rep. No. 1487, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6605 ..... *Passim*

Other Authorities:

Restatement (Second) of Foreign Relations Law of the United States § 18 (1965) 12

Friedman & Blau, *Formulating a Commercial Exception to the Act of State Doctrine: Alfred Dunhill of London* v. *Republic of Cuba*, 50 St. John's L. Rev. 666 (1976) 17

Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 Colum. J. of Transnat'l L. 211 (1979) 16

No.

IN THE

Supreme Court of the United States

October Term, 1981

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Petitioners,

v.

TEXAS TRADING & MILLING CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals is reported at 647 F.2d 300 (2d Cir. 1981) (1a*); the opinion of the District Court in the *Texas* action is reported at 500 F. Supp. 320 (S.D.N.Y. 1980) (39a); and the opinion of the District Court in the *Nikkei* and *East Europe* actions is reported at 497 F. Supp. 893 (S.D.N.Y. 1980) (57a).

* Parenthetical references with the suffix "a" are to the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on April 16, 1981 (35a), and a timely petition for rehearing was denied on August 13, 1981. (37a). This petition was filed within 90 days of that date. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

Statutes Involved

The Immunities Act is codified at 28 U.S.C. §§ 1330; 1332(a)(2)-1332(a)(4); 1391(f); 1441(d); and 1602-1611. This case involves the following provisions:

—28 U.S.C. § 1330. *Actions against foreign states*

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603 (a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

• • •

—28 U.S.C. § 1603. *Definitions*

For purposes of this chapter—

• • •

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

—28 U.S.C. § 1605. *General exceptions to the jurisdictional immunity of a foreign state*

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * *

Statement of the Case

Respondents commenced separate actions in the District Court against Nigeria and Central Bank, and invoked the Immunities Act as the basis for jurisdiction. Each respondent alleged that subject matter and personal juris-

diction were conferred pursuant to 28 U.S.C. § 1330(a) and (b) by virtue of the existence of one or more of the exceptions to jurisdictional immunity defined in 28 U.S.C. § 1605 (a)(2).

The claims arise out of the following transactions: In early 1975, respondents entered into separate but similar agreements with the Federal Ministry of Defence of Nigeria for the supply and delivery to Nigeria of large quantities of cement ("the cement contracts"). Pursuant to the terms of the cement contracts, Central Bank established separate but similar irrevocable documentary letters of credit in favor of each respondent as the means of payment for the cement ("the letters of credit"). Each respondent claimed that there had been an anticipatory breach of its cement contract by Nigeria and of its letter of credit by Central Bank, and each sought money damages for alleged lost profits relating to the unperformed obligations of the cement contract and letter of credit.

In the *Texas* action, the District Court dismissed the complaint on the motion of Nigeria and Central Bank; it found that none of the exceptions to immunity defined by the Immunities Act existed. The District Court's analysis of the Immunities Act (44-55a) focused upon the provision relied upon by Texas—the third situation defined in 28 U.S.C. §1605(a)(2), which denies jurisdictional immunity where "the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States" (the "direct effect" provision). Texas appealed from the judgment of the District Court.

The *Nikkei* and *East Europe* actions, and the *Chenax* action, were consolidated for all purposes at their initial stages in the District Court. Nigeria and Central Bank moved to dismiss the complaints for lack of jurisdiction. The District Court adopted the recommendation of the U.S. Magistrate, to whom the motion had been referred, and sustained jurisdiction pursuant to the "direct effect" provision of the Immunities Act. After a trial on the merits, the District Court reviewed the issues of jurisdiction; this by virtue of a number of decisions that had been rendered about that time interpreting the Immunities Act, including two by the same District Court in similar actions against Nigeria and Central Bank wherein the District Court dismissed the complaints for lack of jurisdiction: the *Texas* action and *Verlinden B.V.* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980) (hereinafter "*Verlinden*"). In its opinion in the *Nikkei*, *East Europe* and *Chenax* actions, the District Court again sustained jurisdiction pursuant to the "direct effect" provision of the Immunities Act (75-85a), and made findings and determinations with respect to the merits of the claims. (85-100a). Nigeria and Central Bank appealed from the jurisdictional determination in all three actions and from the judgments on the merits in the *Nikkei* and *East Europe* actions.

The appeals in the *Texas*, *Nikkei*, *East Europe* and *Chenax* actions presented common questions of law and fact with respect to the issue of jurisdiction pursuant to the Immunities Act and the appeals were submitted and argued jointly in the Court of Appeals.*

* Appeals in two other actions were also submitted and argued with these four, but were the subject of separate opinions by the

(footnote continued on next page)

The Court of Appeals, in a single opinion, sustained jurisdiction in the four actions pursuant to the "direct effect" provision of the Immunities Act.

The facts relevant to the jurisdictional issues are similar in all of the actions: Respondents negotiated and executed their cement contracts in Nigeria. Respondents were to obtain the cement, and the ships to transport the cement, from sources outside the United States, principally from cement producers and ship owners in Spain. The Court of Appeals noted that respondents are American corporations operating as " 'trading companies' which buy from one person and sell to another in hopes of making a profit on the differential". (6a). In its cement contract, each respondent indicated that its letter of credit was to be available to it through its own bank, in each case a New York bank. Irrevocable documentary letters of credit were established in Nigeria by Central Bank, which is the financial arm of the Government of Nigeria and an "agency or instrumentality of a foreign state" within the definition of the Immunities Act, 28 U.S.C. §1603(b).

The Court of Appeals and the District Court took varying positions on the issue of whether the letters of credit had been established in accordance with the provision common to all of the cement contracts, which stated that Nigeria would establish the letter of credit "through (the bank designated by respondent)"; *e.g.*, the Texas cement contract quoted by the District Court. (40a). As to each of the letters of credit, Morgan Guaranty Trust Company

---

Court of Appeals from which Nigeria and Central Bank do not seek review: *Verlinden B.V.* v. *Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981); and *Reale International, Inc.* v. *Federal Republic of Nigeria*, 647 F.2d 330 (2nd Cir. 1981).

of New York ("Morgan Guaranty") acted as an intermediary paying and advising bank. Morgan Guaranty also performed other services for Nigeria and Central Bank in its role as a correspondent bank in the United States, but these services were unrelated to the transactions at issue.

Respondents had requested to be paid in New York and the letters of credit were established to permit this. Except for the payments to be made to respondents, and the fact that respondents are American corporations, the transactions had no contact with the United States.

In each action, respondent alleged that the act of anticipatory breach giving rise to its claims was the instruction from Central Bank to it, transmitted by Morgan Guaranty in a letter dated September 30, 1975, advising that all further presentments under the letter of credit would be required to show compliance with certain regulations promulgated by Nigeria with respect to its recently imposed ports embargo.

On the basis of these facts, the Court of Appeals held that the requirements of the "direct effect" provision of §1605(a)(2) had been satisfied, thereby conferring subject matter jurisdiction as to the claims (17-27a); and that all of the activities of Nigeria and Central Bank in the United States, and of Morgan Guaranty on their behalf, including activities unrelated to the cement contracts and letters of credit, satisfied the due process standard defined in decisions spanning *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) to *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), thereby conferring personal jurisdiction with respect to Nigeria and Central Bank. (27-32a).

Reasons for Granting the Writ

POINT I

The Court of Appeals' analysis of the provisions of the Immunities Act defining subject matter and personal jurisdiction fails to comply with the requirements of the Immunities Act and the directive of Congress to treat these provisions as integrated and interrelated.

A. The provisions of the Immunities Act defining subject matter and personal jurisdiction

The Immunities Act "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." *See,* House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States,* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6605, 6610 (*"House Report"*). The *House Report* expresses the views of the Senate Judiciary Committee as well. (13a, n.18).

Subject matter jurisdiction and personal jurisdiction are defined in 28 U.S.C. §1330(a) and (b) respectively, *supra* at p. 2. Under the Immunities Act there is subject matter jurisdiction provided one of the exceptions to immunity defined in §§1605-1607 exists with respect to the claim asserted. Personal jurisdiction is conferred as to all claims as to which subject matter jurisdiction exists, provided the foreign state has been served pursuant to §1608.

It is evident that the provisions with respect to subject matter jurisdiction, personal jurisdiction and the exceptions

to immunity are integrated and interrelated. The Court of Appeals described them as "a series of intricately coordinated provisions" (13a).

Congress explained the relationship of the provisions in the *House Report*:

> Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-1607 are all carefully interconnected. (footnotes omitted). *Id.* at 6612.

The Court of Appeals noted with respect to the statutory scheme that at first glance it would appear that a finding that subject matter jurisdiction exists would also be dispositive of the questions of the availability of sovereign immunity as a defense and the propriety of personal jurisdiction over the foreign state (13a). Petitioners respectfully submit that, if anything, the converse is true. There can be no subject matter jurisdiction unless the claim is one as to which the foreign state is not entitled to immunity under §§1605-1607. As Congress noted, each of these sections defines the required contacts between the lawsuit and the United States which must exist in order to confer personal jurisdiction. If these contacts do not exist, there is no personal jurisdiction, but neither is there subject matter jurisdiction.

It becomes crucial to focus closely on the particular exception to immunity which may apply. The *House Report* contains a section-by-section analysis of the Immunities Act wherein guidelines are set forth for the interpretation of each of the immunity provisions in §§1605-1607. *Id.* at 6616-22. These guidelines are the key to the interpretation of the immunity provisions and set forth the legislative intent with respect to the statute. The Court of Appeals chose to ignore these guidelines.

B. The analysis by the Court of Appeals

The Court of Appeals described the Immunities Act as "a new and vaguely-worded statute" (4a), which "is complex and largely unconstrued, and [which] has introduced sweeping changes in some areas of prior law." (12a). The

Court of Appeals viewed the present actions as presenting an opportunity "to untie the [Act's] Gordian knot, and to vindicate the Congressional purposes behind the Act" (14a), so as "to give form and substance to the legislative intent." (5a).

The Court of Appeals proceeded to structure a five-part analysis of the immunity provision it believed relevant—the "direct effect" provision of §1605(a)(2). (16-17a). For the reasons set forth in detail below, petitioners respectfully submit that the Court of Appeals misconstrued and misapplied the Immunities Act.

POINT II

The Court of Appeals disregarded the intent of Congress in its interpretation of the "direct effect" provision of §1605(a)(2) and defined no clear or meaningful standard for the application of the provision.

The Immunities Act at §1605(a)(2), *supra* at p. 3, defines three exceptions to immunity when the action concerns commercial activity of the foreign state. Congress acknowledged that this provision defines the most important exceptions to immunity. *See, House Report* at 6617. (14a, n.20).

The "direct effect" provision of §1605(a)(2) states that: "A foreign state shall not be immune . . . in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

The *House Report* explains that the "direct effect" provision "would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." *Id.* at 6618. Section 18 of the *Restatement* is set forth in the District Court's opinion in the *Texas* action (48a).

The Court of Appeals concluded that "neither 'direct' nor 'in the United States' is a term susceptible of easy definition." (26a). It declined, however, to apply the norms Congress specifically delineated as applicable to the "direct effect" provision, *i.e.*, Section 18 of the *Restatement;* and it considered vague the statement in the *House Report, supra* at p. 9, that the Immunities Act is patterned after the long-arm statute Congress enacted for the District of Columbia (23-24a).

Without defining "direct", the Court of Appeals held that "the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss." (24a). The Court goes on to say, however, that a corporation is no more than a series of conduits for the filtering of profit or loss and that "[h]arm to any component [of the corporation] is somewhat 'indirect', and locating the site of the injury, especially when the harm consists in an omission, is an enterprise fraught with artifice." (26a).

The Court of Appeals concluded finally that the pertinent question when interpreting the "direct effect" pro-

vision is whether "the effect [was] sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case." (26a). The determination is to be made not by "rigid parsing of §1605(a)(2)" but with reference to "Congress's concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign." (26a).

Petitioners respectfully submit that this interpretation simply begs the question as to the meaning of the "direct effect" provision. By dismissing the Congressional guidelines, the Court of Appeals has frustrated a determination of what cases "Congress would have wanted an American court to hear." (26a). The Court of Appeals' analysis results in no clear standard that would make application of the "direct effect" provision meaningful.

The Court of Appeals held that the requirements of the provision were satisfied in the instant cases because respondents are American corporations who "were to present documents and collect money in the United States." (25a). The Court concludes: "[w]e have no doubt that Congress intended to bring suits like these into American courts . . . and we hold that statutory subject matter jurisdiction here exists." (26a).

The Court of Appeals found subject matter jurisdiction pursuant to §1330(a) without considering whether the "necessary contacts" prescribed by the "direct effect" provision of §1605(a)(2) exist so as to permit the exercise of personal jurisdiction. The approcah contravenes the intent of Congress. *See, House Report* at 6612, *supra* at p. 9.

Petitioners respectfully disagree with the unsupported statement of the Court of Appeals that the application of the Immunities Act has resulted in "considerable confusion in the district courts." (13a). Courts, including the District Court in the instant actions and the Court of Appeals itself, have applied the Congressional guidelines as set forth in the *House Report* and have concluded that the "direct effect" provision of §1605(a)(2) requires that the action arise out of a commercial act of the foreign state performed outside the United States which causes a substantial effect in the United States as a direct and foreseeable result of the act; and that the effect is not "substantial" unless the specific commercial transaction at issue involves contacts with the United States beyond those resulting from the fact that plaintiff is domiciled in the United States. *See,* District Court Opinions in the *Texas* action (44-55a) and in the *Nikkei* and *East Europe* actions (75-85a). *See, also, Verlinden, supra,* 488 F. Supp. at 1293-1300; *Harris* v. *VAO Intourist, Moscow,* 481 F. Supp. 1056 (E.D.N.Y. 1979); *Chicago Bridge* v. *Islamic Republic of Iran,* 506 F. Supp. 981 (N.D.Ill. 1980); *Upton* v. *Empire of Iran,* 459 F. Supp. 264 (D.D.C. 1978), *aff'd,* 607 F.2d 494 (D.C.Cir. 1979); and the Court of Appeals decision in *Carey* v. *National Oil Corp.,* 592 F.2d 673 (2d Cir. 1979).

In the *Texas* action, the District Court held that the requirements of the "direct effect" provision were not satisfied where the only effect in the United States resulted from payment in New York to a New York plaintiff with respect to a transition made and to be performed outside the United States (51-52a). The District Court held that "the purported injury caused by the breach of contract

takes place in the United States 'only because the plaintiff is domiciled or doing business here' " and that "[t]his . . . 'is an insufficient contact for due process purposes' "; *citing, East Europe Domestic International Sales Corp.* v. *Terra,* 467 F.Supp. 383, 390 (S.D.N.Y.), *aff'd mem.,* 610 F.2d 806 (2d Cir. 1979). (52a). The District Court dismissed the complaint for lack of *both* subject matter and personal jurisdiction (55a).

The District Court in the *Nikkei* and *East Europe* actions reached the opposite conclusion principally because, in the opinion of petitioners, the Court made inaccurate findings of fact with respect to how the letters of credit were established and operated and the Court misapplied the due process standard to a situation exactly like that in the *Texas* action as to the contacts the transaction had with the United States. Petitioners, however, agree that the District Court's approach to the analysis of the Immunities Act was in accord with the provisions of the Act and the legislative intent.

The Court of Appeals, in defense of its different approach, referred to prior law which it said defined a "broad right to bring suits against foreign states", and to the intent of Congress to "regularize" rather than "constrict" the former rule. (26a). Prior to the Immunities Act, however, actions against foreign states invariably were commenced by the attachment of assets and resulted in *quasi in rem* jurisdiction; or were the result of the foreign state's contractual submission to jurisdiction in the United States. *See, National American Corp.* v. *Federal Republic of Nigeria,* 448 F.Supp. 622, 635-637 (S.D.N.Y. 1978), *aff'd,* 597 F.2d 314 (2d Cir. 1979), discussing *Victory Transport, Inc.*

v. *Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) and *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966). *See, also*, Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 Colum. J. of Transnat'l L. 211 (1979). The Court of Appeals itself recognized the state of the prior law. (28a). §1330(a) of the Immunities Act, by its terms, restricts the jurisdiction of the courts to "claim[s] for relief in personam." *Supra* at p. 2. Petitioners respectfully submit that the analysis by the Court of Appeals provides no meaningful rationale for the exercise of jurisdiction pursuant to the "direct effect" provision of §1605(a)(2).

POINT III

The Court of Appeals failed to consider whether the particular act of breach was "governmental" or "commercial" activity of the foreign state.

The focus of the "direct effect" provision of §1605(a)(2) is the *act* which gives rise to the claim. The *House Report* states that the provision embraces "*commercial* conduct abroad having direct effects within the United States." (Emphasis added). *Id.* at 6618; *supra* at p. 9.

The Court of Appeals discussed the commercial nature of the cement contract and letter of credit transactions (17-22a), but never analyzed the nature of the act of breach cited by respondents as having given rise to their claims—the letter instructions from Central Bank in late September 1975 which required proof of compliance with the sailing

regulations promulgated by Nigeria on August 9, 1975 and described by the Court of Appeals. (10a).

Throughout these proceedings, petitioners' position has been that the letter instructions from Central Bank were an integral part of the direct implementation of the regulations promulgated by Nigeria to enforce its ports embargo; that the imposition and implementation of a ports embargo is recognized internationally as permissible *governmental* activity of a sovereign state; and that jurisdiction may not be conferred pursuant to the "direct effect" provision of §1605(a)(2) if the act in question is governmental activity of the foreign state. The District Court in the *Texas* action recognized petitioners' position, but did not rule with respect thereto since the Court found that, even if petitioners' acts constituted commercial activity, such activity would not sustain the requirements of the "direct effect" provision. (47a).

In *Alfred Dunhill of London, Inc.* v. *Cuba,* 425 U.S. 682 (1976), this Court recognized that governmental activity of a sovereign state can also affect directly its commercial obligations. Although a majority of this Court held that the activity in question did not constitute an act of state, the Court divided equally on the question of whether there should be a commercial acts exception to the act of state doctrine. *See, also,* Friedman & Blau, *Formulating a Commercial Exception to the Act of State Doctrine: Alfred Dunhill of London* v. *Republic of Cuba,* 50 St. John's L. Rev. 666, 682-83 (1976).

Petitioners respectfully submit that the Court of Appeals erroneously omitted to consider the nature of the act

giving rise to respondents' claims; and that the acts in question were governmental acts of petitioners which do not support jurisdiction pursuant to the Immunities Act.

POINT IV

The Immunities Act does not incorporate a due process standard co-extensive with constitutionally permitted limits.

In its separate consideration of personal jurisdiction, (28-32a), the Court of Appeals assumed that the Immunities Act incorporates a due process standard co-extensive with constitutionally permitted limits, as defined by this Court in decisions spanning *International Shoe Co.* v. *Washington* to *World-Wide Volkswagen Corp.* v. *Woodson, supra.* (29a).

The Court of Appeals found that, pursuant to this standard, petitioners repeatedly and purposefully had availed themselves of the privilege of conducting activities in the United States and had invoked the benefits and protection of American laws. (30-31a). Many of the activities cited by the Court of Appeals had nothing whatever to do with the cement contracts or letters of credit which are the subject of respondents' actions. In addition, the finding by the Court of Appeals that the Deputy Governor of Central Bank purportedly threatened to take Morgan Guaranty to court if it failed to comply with Central Bank's instructions on the letters of credit (11a, 30a), was based solely on hearsay evidence that had never even been offered by respondents to the District Court.

Petitioners respectfully submit that the assumption by the Court of Appeals as to the due process standard applicable to the Immunities Act was incorrect.

Personal jurisdiction under the Immunities Act is conferred only when the requirements of the immunity provisions, §§1605-1607, are satisfied. "These provisions . . . prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." *House Report* at 6612; *supra* at p. 9. If jurisdiction is to be sustained pursuant to §1605(a)(2), due process standards can be applied only with respect to the *particular* commercial activity upon which the claim is based.

In *Harris* v. *VAO Intourist, Moscow, supra,* the District Court held that:

> Congress has adopted a special jurisdictional statute . . . it has authorized the exercise of *less* than the complete personal jurisdiction that might constitutionally be afforded American courts under traditional concepts of fairness and due process . . . Congress did *not* incorporate into the Immunities Act an in personam basis predicated upon presence or, as it is referred to in the District of Columbia Court Reform Act, an "enduring relationship." (Emphasis added). 481 F.Supp. at 1059.

Accord, Verlinden, supra ("The Immunities Act rejected the traditional jurisdictional test of 'doing business' . . ."), 488 F.Supp. at 1295. The District Court in *Verlinden* analyzed in detail a letter of credit transaction with Central Bank similar to those at issue herein, and the role of Morgan Guaranty with respect thereto, and concluded that there was no basis for conferring personal jurisdiction. *Id.* at 1295-1297.

Petitioners respectfully submit that the analysis by the District Courts in *Harris* and *Verlinden* is correct, as are the findings and conclusions of the District Court in *Texas* with respect to the due process considerations applicable to the "direct effect" provision of §1605(a)(2). (51-55a).

The due process standard of the Immunities Act does not "constrict" jurisdiction permitted under prior law. (26a). Traditionally, the due process standard applied by the Court of Appeals herein was never employed to confer personal jurisdiction over foreign states. *See*, petitioners' discussion of the prior law, *supra* at pp. 15-16, and the authorities cited.

POINT V

The Court of Appeals decision with respect to due process conflicts directly with a recent Ninth Circuit decision in an action which presented substantially identical facts.

The Ninth Circuit in *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980), was required to interpret the California long-arm statute which allows the exercise of personal jurisdiction to the limits permitted by the U.S. Constitution. The Ninth Circuit held that the California statute did not confer jurisdiction over an agency of the Republic of Costa Rica with respect to the California plaintiff-seller's claim of anticipatory breach of an agreement to sell corn. Payment for the corn was to be effected by a letter of credit confirmed by a California bank. Plaintiff had alleged jurisdiction based upon diversity of citizenship pursuant to 28

U.S.C. §1332(a)(2). The Ninth Circuit discussed the current law with respect to the exercise of *in personam* jurisdiction as defined by *International Shoe* through *World-Wide Volkswagen Corp., supra. Id.* at 1250-51.

To determine whether the defendant's contacts with California were sufficient to permit the State to compel it to defend in California, the Ninth Circuit reviewed several California decisions analogous on the facts, including *Floyd J. Harkness Co.* v. *Amezcua*, 60 Cal. App.3d 687, 131 Cal. Rptr. 667 (1976), wherein the California Court had before it a similar claim by a California corporation against a resident of Mexico with respect to an agreement negotiated and to be performed outside California. Although defendant had frequent telephone contact with plaintiff in California and had, pursuant to the agreement, advanced money to plaintiff and executed promissory notes payable in California, the California Court found these contacts too tenuous to support jurisdiction, holding:

> The acts of making notes executed elsewhere by a non-resident defendant payable to a California resident in California or the acts of making interstate telephone calls relative to the performance of a contract executed outside the state and performed outside the state does not invoke the benefits and protections of our laws. 131 Cal.Rptr. at 670. 614 F.2d at 1252-53.

In *Gonzalez*, the Ninth Circuit held that defendant's contacts with California with respect to other sales agreements did not support personal jurisdiction as to the particular agreement out of which plaintiff's claim arose. The Ninth Circuit found it unnecessary to determine whether the Immunities Act provided a basis for jurisdiction over

defendant on the grounds that the "direct effect" provisions of §1605(a)(2) embody the "minimum contacts" standard of *International Shoe*, etc., and that standard had not been satisfied. *Id.* at 1255.

The Court of Appeals cited *Gonzalez* as an example of the application of the due process clause in a suit against a foreign state *in personam* (28a), but the Court of Appeals did not discuss the decision.

Petitioners respectfully submit that the "direct effect" provision of §1605(a)(2) does not confer jurisdiction herein because, even if the relevant acts were "commercial", the effects in the United States resulting from a repudiation of the agreements at issue occurred fortuitously by virtue of respondents being United States corporations who requested to be paid here on transactions that were made and to be performed outside the United States.

Respectfully submitted,

JAMES G. SIMMS
Suite 1840
120 Broadway
New York, New York 10271
(212) 962-2000

Counsel for Petitioners

Of Counsel:
KISSAM, HALPIN & GENOVESE
120 Broadway
New York, New York 10271

November 11, 1981

Certificate of Service

I certify that, in accordance with Rule 28.3 of the Rules of this Court, three copies of the within Petition for a Writ of Certiorari and of the Appendix thereto have been served upon the following counsel of record for the parties, by delivery to the offices of counsel of record:

Abram Chayes
Counsel for all Respondents

Berthold H. Hoeniger
Counsel for Respondent
East Europe Import-Export, Inc.
505 Park Avenue
New York, New York 10022

Richard H. Webber
Counsel for Respondent
Texas Trading & Milling Corp.
Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy
72 Wall Street
New York, New York 10005

Lewis S. Sandler
Counsel for Respondent
Decor by Nikkei International, Inc.
620 Fifth Avenue
New York, New York 10020

Mr. Chayes, who resides in Cambridge, Massachusetts, has consented to be served at the offices of Mr. Hoeniger in New York.

Dated: November 11, 1981

James G. Simms
Suite 1840
120 Broadway
New York, New York 10271
(212) 962-2000

Counsel for Petitioners

Appendix

81-885 No.

Office
NOV 12 1981
ALEXANDER

IN THE

Supreme Court of the United States

October Term, 1981

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Petitioners,

v.

TEXAS TRADING & MILLING CORP., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

JAMES G. SIMMS
Suite 1840
120 Broadway
New York, New York 10271
(212) 962-2000

Counsel for Petitioners

Of Counsel:
KISSAM, HALPIN & GENOVESE
120 Broadway
New York, New York 10271

November 11, 1981

TABLE OF CONTENTS

PAGE

Opinion of the United States Court of Appeals for the Second Circuit 1a

Judgment of the United States Court of Appeals for the Second Circuit 35a

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing 37a

Opinion of United States District Court in *Texas Trading* Action 39a

Judgment of United States District Court in *Texas Trading* Action 56a

Opinion of United States District Court in *Nikkei* and *East Europe* Actions 57a

Judgment of United States District Court in *Nikkei* Action 101a

Judgment of United States District Court in *East Europe* Action 103a

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 644, 645, 646, 647, 1369, 1370, 1371—
September Term, 1980

(Argued March 6, 1981 Decided April 16, 1981)

Docket Nos. 80-7703, 7771, 7773, 7783, 7803, 7811, 7813

TEXAS TRADING & MILLING CORP.,

Plaintiff-Appellant,

—against—

FEDERAL REPUBLIC OF NIGERIA
and CENTRAL BANK OF NIGERIA,

Defendants-Appellees.

DECOR BY NIKKEI INTERNATIONAL, INC.,
d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

FEDERAL REPUBLIC OF NIGERIA
and CENTRAL BANK OF NIGERIA,

Defendants-Appellants-Cross-Appellees.

Opinion of the United States Court of Appeals for the Second Circuit

CHENAX MAJESTY, INC.,

Plaintiff-Appellant-Cross-Appellee,

—against—

FEDERAL REPUBLIC OF NIGERIA
and CENTRAL BANK OF NIGERIA,

Defendants-Appellees-Cross-Appellants.

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

FEDERAL REPUBLIC OF NIGERIA
and CENTRAL BANK OF NIGERIA,

Defendants-Appellants-Cross-Appellees.

Before:

KAUFMAN and TIMBERS, *Circuit Judges,*
and WARD, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* and appeals and cross-appeals from three final judgments of that court, Lawrence W. Pierce, *Judge,* presenting issues under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611.

---

* Of the United States District Court for the Southern District of New York, sitting by designation.

The order of Judge Cannella is reversed and the case is remanded.

The judgments entered on orders of Judge Pierce are affirmed.

ABRAM CHAYES, Cambridge, Mass., *for all Plaintiffs.*

RICHARD H. WEBBER, New York, N.Y. (Peter W. Flanagan, Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, New York, N.Y., of counsel), *for Plaintiff-Appellant Texas Trading & Milling Corp.*

LEWIS S. SANDLER, New York, N.Y., *for Plaintiff-Appellee-Cross-Appellant Decor by Nikkei International, Inc.*

ROBERT LAYTON, New York, N.Y. (Daniel J. Brooks, Thomas L. Abrams, Layton and Sherman, New York, N.Y., of counsel), *for Plaintiff-Appellant-Cross-Appellee Chenax Majesty, Inc.*

BERTHOLD H. HOENIGER, New York, N.Y., *for Plaintiff-Appellee-Cross-Appellant East Europe Import-Export, Inc.*

JAMES G. SIMMS, New York, N.Y. (Craig P. Murphy, Peter J. Dranginis, Jr., Kissam, Halpin & Genovese, New York, N.Y., of counsel), *for Defendants.*

Opinion of the United States Court of Appeals for the Second Circuit

KAUFMAN, *Circuit Judge:*

These four appeals grow out of one of the most enormous commercial disputes in history, and present questions which strike to the very heart of the modern international economic order. An African nation, developing at breakneck speed by virtue of huge exports of high-grade oil, contracted to buy huge quantities of Portland cement, a commodity crucial to the construction of its infrastructure. It overbought, and the country's docks and harbors became clogged with ships waiting to unload. Imports of other goods ground to a halt. More vessels carrying cement arrived daily; still others were steaming toward the port. Unable to accept delivery of the cement it had bought, the nation repudiated its contracts. In response to suits brought by disgruntled suppliers, it now seeks to invoke an ancient maxim of sovereign immunity—*par in parem imperium non habet*[1]—to insulate itself from liability. But Latin phrases speak with a hoary simplicity inappropriate to the modern financial world. For the ruling principles here, we must look instead to a new and vaguely-worded statute, the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act")[2]—a law described by its draftsmen as providing only "very modest guidance" on issues of preeminent importance.[3] For answers to those most difficult questions, the authors of the law "decided to put [their] faith in the U.S. courts."[4]

---

1 "An equal has no dominion over an equal."

2 Act of October 21, 1976, Pub. L. 94-583, 90 Stat. 2891, *codified at* 28 U.S.C. §§ 1330; 1332(a)(2)-1332(a)(4); 1391(f); 1441(d); and 1602-1611.

3 *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 94th Cong., 2d Sess. 53 (1976) *("1976 Hearings")* (testimony of Monroe Leigh, Legal Adviser, Dep't of State).

4 *Id.*

Guided by reason, precedent, and equity, we have attempted to give form and substance to the legislative intent. Accordingly, we find that the defense of sovereign immunity is not available in any of these four cases.[5]

I.

The facts of the four appeals are remarkably parallel, and can be stated in somewhat consolidated form.[6] Early in 1975, the Federal Military Government of the Federal Republic of Nigeria ("Nigeria") embarked on an ambitious program to purchase immense amounts of cement. We have already had occasion in another case to call the program "incredible," *see National American Corp.* v. *Federal Republic of Nigeria,* 597 F.2d 314, 316 (2d Cir. 1979), but the statistics speak for themselves. Nigeria executed 109 contracts, with 68 suppliers. It purchased, in all, over sixteen million metric tons of cement. The price was close to one billion dollars.

A.

Four of the 109 contracts were made with American companies that were plaintiffs below in the cases now before us: Texas Trading & Milling Corp. ("Texas Trading"), Decor

---

5 These four appeals are part of a group of seven, heard together on appeal and decided in concert today. The other three are *Verlinden B. V.* v. *Central Bank of Nigeria,* No. 80-7413, slip op. at ____ (2d Cir. Apr. 16, 1981); *Reale International, Inc.* v. *Federal Republic of Nigeria,* No. 81-7183, slip op. at ____ (2d Cir. Apr. 16, 1981); and *Gemini Shipping, Inc.* v. *Foreign Trade Organization for Chemicals and Foodstuffs,* No. 80-7851, slip op. at ____ (2d Cir. Apr. 16, 1981).

6 Since *Texas Trading* was dismissed below on jurisdictional grounds, its facts arrive before us as mere allegations, assumed for purposes of this opinion to be true. The other three cases have gone to trial, and contain formal findings. The facts of all four cases are set forth in greater detail in the opinions of the district court.

by Nikkei International, Inc. ("Nikkei"), East Europe Import-Export, Inc. ("East Europe"), and Chenax Majesty, Inc. ("Chenax"). The four plaintiffs are not industrial corporations; they are, instead, "trading companies," which buy from one person and sell to another in hopes of making a profit on the differential. Each of the plaintiffs is a New York corporation.

The contracts at issue were signed early in 1975. Each is substantially similar; indeed, Nigeria seems to have mimeographed them in blank, and filled in details with individual suppliers. Overall, each contract called for the sale by the supplier to Nigeria of 240,000 metric tons of Portland cement.[7] Specifically, the contracts required Nigeria, within a time certain after execution,[8] to establish in the seller's favor "an Irrevocable, Transferable abroad, Divisible and Confirmed letter of credit" for the total amount due under the particular contract, slightly over $14 million in each case.[9] The contract also named the bank through which the letter of credit was to be made payable. Nikkei and East Europe named First National City Bank in New York, and Texas Trading specified Fidelity International Bank, also in New York. Chenax denominated Schroeder, Muenchmeyer, Hengst & Co. of Hamburg, West Germany. Drafts under the letters of credit were to be "payable at sight, on presentation" of certain documents to the specified bank.

---

7 The Texas Trading, Nikkei, and Chenax contracts provided for the sale of 240,000 tons, "plus or minus 10% at seller's option." The East Europe contract was for 240,000 tons, *simpliciter*.

8 Twenty-one days in the Texas Trading, Nikkei, and Chenax contracts; fourteen days in the East Europe contract.

9 The Texas Trading, Nikkei, and Chenax contracts set the price of the cement at $60 per ton, so each plaintiff was promised a letter of credit for $14.4 million. The cement price in the East Europe contract was $59.50 per ton; accordingly, the East Europe letter of credit was to be for $14.28 million.

Within a time certain after establishment and receipt of the letter of credit,[10] each seller was to start shipping cement to Nigeria. The cement was to be bagged, and was to meet certain chemical specifications. Shipments were to be from ports named in the contracts, mostly Spanish, and were to proceed at approximately 20,000 tons per month. Delivery was to the port of Lagos/Apapa, Nigeria, and the seller was obligated to insure the freight to the Nigerian quay. Each contract also provided for demurrage.[11] The Nikkei and East Europe contracts provided they were to be governed by the laws of the United States. The Chenax contract specified the law of Switzerland, and the Texas Trading contract named the law of Nigeria.

In short, performance under the contracts was to proceed as follows. Nigeria was to establish letters of credit. The suppliers were to ship cement. Each time a supplier had loaded a ship and insured its cargo to Lagos/Apapa, the supplier could take documents so proving to the bank named in the contract and, "at sight," be paid for the amount of cement it shipped. The ship might sink on the way to Nigeria, or it might never leave the Spanish port at all, but—on presentation of proper documents showing a loaded ship and an insured cargo—the supplier had a right to be paid. Demurrage was to operate in the same manner: if a ship was detained in Nigerian waters, the supplier would receive certain documents. It could present the documents to the bank, and receive payment.

---

10 The Texas Trading contract provided for thirty days, the East Europe contract for six weeks, and the Nikkei and Chenax contracts for forty-five days.

11 The Nikkei and East Europe contracts provided for demurrage at a rate "not exceeding $4100 *per diem*," and the Chenax contract set a flat rate of $4100 per day. The Texas Trading contract required Nigeria to pay demurrage "not exceeding $4000 *per diem*."

B.

The actual financial arrangements differed from those set forth in the cement contracts. Instead of establishing "confirmed" letters of credit with the banks named, Nigeria established what it called "irrevocable" letters of credit with the Central Bank of Nigeria ("Central Bank"), an instrumentality of the Nigerian government,[12] and advised those letters of credit through the Morgan Guaranty Trust Company ("Morgan") of New York. That is, under the letters of credit as established, each seller was to present appropriate documents not to the named bank, but to Morgan. And, since the letters were not "confirmed," Morgan did not promise to pay "on sight"; it assumed no independent liability.[13] Each of the letters of credit provided it was to be governed by the Uniform Customs and Practice for Documentary Credits ("UCP") (1962 Revision), as set forth in Brochure No. 222 of the International Chamber of Commerce.

Nigeria's choice of Morgan as the bank to which suppliers presented documents and from which suppliers secured payments came in the course of a longstanding relationship between Nigeria and Morgan. Central Bank used Morgan as its correspondent bank in the United States, and Morgan conducted myriad transactions on Nigeria's behalf. Employ-

---

12 Central Bank was established in 1958 under the Central Bank of Nigeria Act 1958. Section 4(1) of the Act provides:

> The principal objects of the Bank shall be to issue legal tender currency in Nigeria, to maintain external reserves to safeguard the international value of that currency, to promote monetary stability and a sound financial structure in Nigeria and to act as banker and financial adviser to the Federal Government.

13 The letters of credit as established varied from the contracts in other respects, but the discrepancies were cured by amendments to the letters of credit to which both parties agreed.

ees of Central Bank regularly came to Morgan for training seminars. On Nigeria's request, Morgan made payments to Nigerian students in the United States, to American corporations to which Nigeria owed money, and to the Nigerian embassy and consulates in the United States. Indeed, Nigeria used Morgan to make payments (for salaries, operating expenses, and the like) to Nigerian embassies in other countries as well. Until 1974, Morgan had the right to draw up to $1 million per day from Nigeria's account at the Federal Reserve Bank of New York to satisfy Nigeria's obligations. Nigeria raised the limit to $3 million per day in 1974, and Morgan enjoyed unlimited drawing rights on Nigeria's funds beginning in November 1975. Central Bank kept over $200 million of securities in a custody account at Morgan. Morgan advised as much as $200 million in letters of credit established by Nigeria, and confirmed, in addition, letters of credit totalling at least $70 million more.

After receiving notice that the letters of credit had been established, the suppliers set out to secure subcontracts to procure the cement, and shipping contracts to transport it.[14] They, through their subcontractors, began to bag the cement and load it on ships, as suppliers across the globe were doing the same. Hundreds of ships arrived in Lagos/Apapa in the summer of 1975, and most were carrying cement. Nigeria's port facilities could accept only one to five million tons of

---

14 Nikkei contracted with Productos Fontanet, a Spanish corporation with an interest in a cement plant and a shipping company, for the purchase and delivery of 120,000 tons of cement with an option for 120,000 tons more. The price was $54 per ton for the first 8500 tons, and $52 per ton for the rest. East Europe secured a contract for 120,000 tons with Intrafinsa, another Spanish supplier, at $51.25 per ton, and the district court found East Europe would have been able to fulfill the rest of its contract at the same price. Texas Trading contracted with yet another Spanish company, at $53.10 per ton. Chenax searched for a subcontractor, but never found one; its efforts never rose above the level of oral negotiations.

cement per year; at any rate, they could not begin to unload the over sixteen million tons Nigeria had slated for delivery in eighteen short months. Based on prior experience, Nigeria had made the contracts expecting only twenty percent of the suppliers to be able to perform. By July, when the harbor held over 400 ships waiting to unload—260 of them carrying cement—Nigeria realized it had misjudged the market considerably.

C.

With demurrage piling up at astronomical rates, and suppliers hiring, loading, and dispatching more ships daily, Nigeria decided to act. On August 9, 1975, Nigeria caused its Ports Authority to issue Government Notice No. 1434, a regulation which stated that, effective August 18, all ships destined for Lagos/Apapa would be required to convey to the Ports Authority, two months before sailing, certain information concerning their time of arrival in the port. The regulation also stated vaguely that the Ports Authority would "co-ordinate all sailing," and that it would "refus[e] service" to vessels which did not comply with the regulation. Then, on August 18, Nigeria cabled its suppliers and asked them to stop sending cement, and to cease loading or even chartering ships. In late September, Nigeria took the crucial step: Central Bank instructed Morgan not to pay under the letters of credit unless the supplier submitted—in addition to the documents required by the letter of credit as written—a statement from Central Bank that payment ought to be made. Morgan notified each supplier of Nigeria's instructions, and Morgan commenced refusing to make payment under the letters of credit as written. Almost three months later, on December 19, 1975, Nigeria promulgated Decree No. 40, a law prohibiting entry into a Nigerian port to any

ship which had not secured two months' prior approval, and imposing criminal penalties for unauthorized entry.

Nigeria's unilateral alteration of the letters of credit took place on a scale previously unknown to international commerce. Officers of Morgan explained the potential consequences of Nigeria's action to representatives of Central Bank; Central Bank was adamant that Morgan not pay. After a meeting with Central Bank personnel, one Morgan officer stated that Central Bank's Deputy Governor "responded that the [Nigerian] Government was willing to go to court if we did pay." Within weeks of Nigeria's instructions to Morgan not to pay without the additional documentation, Morgan warned Central Bank in a telex: "We believe that there is an increasing possibility that litigation against you may be instituted in New York."

Nigeria's next step was to invite its suppliers to cancel the contracts. As part of the program, Nigeria convened a meeting at Morgan's offices in New York, to discuss Nigeria's position with members of the American financial community. Over forty suppliers eventually did settle. *See National American Corp.* v. *Federal Republic of Nigeria, supra,* 597 F.2d at 316. Nigeria asked Morgan to effect several of the settlement payments; some were for settling suppliers not located in the United States.

Cement suppliers who did not settle sued in courts all over the world.[15] The four suppliers at issue here—Texas Trading, Nikkei, East Europe, and Chenax—sued in the Southern

---

15 *E.g., Trendtex Trading Corp.* v. *Central Bank of Nigeria,* [1977] 2 W.L.R. 356, 1 All E.R. 881 (United Kingdom); *Hispano Americana Mercantil S.A.* v. *Central Bank of Nigeria,* [1979] 2 Lloyd's L.R. 277 (same); *Ipitrade International, S.A.* v. *Federal Republic of Nigeria* (Int'l Chamber of Commerce Arbitration Award, April 25, 1978), *enforced* 465 F. Supp. 824 (D.D.C. 1978); *Youssef M. Nada Establishment* v. *Central Bank of Nigeria,* 16 Int'l Legal Mat. 501 (1977) (Dist. Ct., Frankfurt/Main, Aug. 25, 1976) (West Germany).

District of New York. Named as defendants were both Nigeria and Central Bank. The complaints alleged that Central Bank's September instructions to Morgan, changing the terms of payment under the letters of credit, constituted anticipatory breaches of both the cement contracts (requiring Nigeria to establish "Irrevocable" letters of credit with certain terms of payment) and the letters of credit (requiring Central Bank to authorize payment when certain documents were presented to Morgan). Defendants do not seriously dispute that their actions constitute such anticipatory breaches;[16] their defenses go more to the propriety of jurisdiction under the FSIA. Judge Cannella in *Texas Trading* found jurisdiction lacking; Judge Pierce in the consolidated *Nikkei, East Europe,* and *Chenax* actions held it present. Judge Pierce proceeded to a trial on the merits, and awarded $1.857 million to Nikkei, $1.986 million to East Europe, and nothing to Chenax. These appeals followed.[17]

II.

The law before us is complex and largely unconstrued, and has introduced sweeping changes in some areas of prior law. *See* House Judiciary Committee, *Jurisdiction of United*

---

16 Article 3 of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Brochure No. 222) provides that letters of credit "can neither be modified nor cancelled without the agreement of all concerned."

17 Defendants appeal from both the jurisdictional rulings and the awards on the merits in *Nikkei* and *East Europe*; plaintiffs cross-appeal from the partial denial of damages. In *Chenax*, plaintiffs appeal from the total denial of damages, and defendants cross-appeal from the finding of jurisdiction. In *Texas Trading*, plaintiffs appeal from the jurisdictional ruling. All appeals are taken formally from the judgment below except in *Texas Trading*. That appeal is taken from Judge Cannella's order, but the error is harmless. *See Poss* v. *Lieberman*, 299 F.2d 358 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).

States Courts in Suits Against Foreign States, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-8, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6605, 6604-6 (*"House Report"*).[18] In structure, the FSIA is a marvel of compression. Within the bounds of a few tersely-worded sections, it purports to provide answers to three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant. *See House Report* at 6611-12. Through a series of intricately coordinated provisions, the FSIA seems at first glance to make the answer to one of the questions, subject matter jurisdiction, dispositive of all three. *See Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 94th Cong., 2d Sess. 28 (1976) (*"1976 Hearings"*) (testimony of Monroe Leigh, Legal Adviser, Department of State).[19] This economy of decision has come, however, at the price of considerable confusion in the district courts. In fact, Congress intended the

---

18 *See also* Senate Judiciary Committee, *Define Jurisdiction of U.S. Courts in Suits Against Foreign States,* S. Rep. No. 1310, 94th Cong., 2d Sess. 8-9. The House and Senate Committees filed identical reports, and references *infra* to the House Report may be deemed to represent the views of the Senate Committee as well.

19 Leigh stated:

> Section 1330 provides that if service is made under section 1608 and if the foreign state is not entitled to immunity, then personal jurisdiction over the foreign state would exist. This is a subtle point. To determine whether it has personal jurisdiction over the foreign state, the court must look not only at whether proper service has been made; the court must also look at the sovereign immunity provisions in sections 1605 through 1607 to determine whether the foreign state is amendable [sic] to jurisdiction.
>
> . . . In short, the jurisdiction section at the beginning of the bill, the immunity provisions, and the service provisions are all carefully interconnected.

sovereign immunity and subject matter jurisdiction decisions to remain slightly distinct, and it drafted the Act accordingly. Moreover, Congress has only an incomplete power to tie personal jurisdiction to subject matter jurisdiction; its prerogatives are constrained by the due process clause. These cases present an opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act.

A.

Turning to the specific provisions of the law, a description of the FSIA's analytic structure is helpful. The jurisdiction-conferring provision of the Act, 28 U.S.C. § 1330(a), creates in the district courts:

> original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Although § 1330(a) refers to sections 1605-1607, the section most frequently relevant,[20] and the one applicable here, is § 1605. It provides, in part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

---

20 The House Report calls § 1605(a)(2) "probably the most important instance in which foreign states are denied immunity." *See* House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6604, 6617 *("House Report")*.

* * * *

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Crucial to each of the three clauses of § 1605(a)(2) is the phrase "commercial activity." In it is lodged centuries of Anglo-American and civil law precedent construing the term "sovereign immunity." If the activity is not "commercial," but, rather, is "governmental," then the foreign state is entitled to immunity under section 1605, and "original jurisdiction" is not present under § 1330(a).[21]

For the definition of "commercial activity," we turn to subsection 1603(d), which provides:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

If "commercial activity" under § 1603(d) is present, and if it bears the relation to the United States required by § 1605(a)(2), then the foreign state is "not entitled to immunity," and the district court has statutory subject matter

---

21 Jurisdiction will be absent unless some other provision of the Act, such as § 1607 or other subsections of § 1605, intervenes. Section 1607 concerns counterclaims, and is not relevant here.

jurisdiction over the claim through § 1330(a). And, if the exercise of that jurisdiction falls within the judicial power set forth by Article III of the Constitution, subject matter jurisdiction over the claim exists.[22]

Our analysis next proceeds to the question of personal jurisdiction; we come again to § 1330. Subsection (b) of section 1330 provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." The Act, therefore, makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction. *See House Report* at 6622. But, the Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant.

In short, a "§ 1605(a)(2) case" calls for the resolution of a series of five questions:

1) Does the conduct the action is based upon or related to qualify as "commercial activity"?
2) Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a)(2), warranting the Court's exercise of subject matter jurisdiction under § 1330(a)?
3) Does the exercise of this congressional subject matter jurisdiction lie within the permissible limits of the "judicial power" set forth in Article III?

---

22 *See Verlinden B. V.* v. *Central Bank of Nigeria, supra,* note 5 (suit by an alien against a foreign state for breach of a contract not governed by federal law is not within federal judicial power).

4) Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)?

5) Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?

It is to those questions we now turn.

B.

Before undertaking the threshold "commercial activity" analysis, our first task is to identify what particular conduct in this case is relevant. Subsection 1603(d) states that "commercial activity" might consist of either "a regular course of commercial conduct" or "a particular commercial transaction or act." The words "regular course of . . . conduct" seem to authorize courts to cast the net wide, and to identify a broad series of acts as the relevant set of activities. *See House Report* at 6615. Here, the relevant "course of . . . conduct" is undoubtedly Nigeria's massive cement purchase program. Alternatively, each of its contracts or letters of credit with these four plaintiffs would qualify as "a particular . . . transaction."

The determination of whether particular behavior is "commercial" is perhaps the most important decision a court faces in an FSIA suit. This problem is significant because the primary purpose of the Act is to "restrict" the immunity of a foreign state to suits involving a foreign state's public acts. *House Report* at 6605. If the activity is not "commercial," it satisfies none of the three clauses of § 1605(a)(2), and the foreign state is (at least under that subsection) immune from suit. Unfortunately, the definition of "commercial" is the one issue on which the Act provides

almost no guidance at all. Subsection 1603(d) advances the inquiry somewhat, for it provides: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." No provision of the Act, however, defines "commercial." Congress deliberately left the meaning open and, as noted above, "put [its] faith in the U.S. courts to work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental." *1976 Hearings* at 53 (testimony of Monroe Leigh). *Accord, House Report* at 6615; *Hearings on H.R. 3493 Before Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary,* 93d Cong., 1st Sess. 16 (1973) (*"1973 Hearings"*) (testimony of Charles N. Brower, Legal Adviser, Department of State).[23] *See also* Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States,* 18 Colum. J. Transnat'l L. 211, 236 (1979). We are referred to no less than three separate sources of authority to resolve this fundamental definitional question.

The first source is statements contained in the legislative history itself. Perhaps the clearest of them was made by Bruno Ristau, then Chief of the Foreign Litigation Section of the Civil Division, Department of Justice. Ristau stated: "[I]f a government enters into a contract to purchase goods and services, that is considered a commercial activity. It avails itself of the ordinary contract machinery. It bargains

---

23 The 1973 bill was introduced as S. 566, 93d Cong., 1st Sess., *see* 119 Cong. Rec. 2204 (1973), and H.R. 3493, 93d Cong., 1st Sess., *see id.* at 2880. The language of § 2 of those bills is identical in material respects to the text of the present 28 U.S.C. § 1330(a). *See, e.g.,* 119 Cong. Rec. 2213-15 (1973) (reprinting S. 566). The 1973 bills were withdrawn by their sponsors, and introduced as revised in H.R. 11315, 94th Cong., 1st Sess., *see* 121 Cong. Rec. 42017 (1975), and S. 3553, 94th Cong., 2d Sess., *see* 122 Cong. Rec. 17454 (1976). H.R. 11315 became the FSIA.

and negotiates. It accepts an offer. It enters into a written contract and the contract is to be performed." *1976 Hearings* at 51. The House Report seems to conclude that a contract or series of contracts for the purchase of goods would be *per se* a "commercial activity," *see House Report* at 6615, and the illustrations cited by experts who testified on the bill—contracts, for example, for the sale of army boots[24] or grain[25]—support such a rule. Or, put another way, if the activity is one in which a private person could engage, it is not entitled to immunity. *See 1976 Hearings* at 24 (testimony of Monroe Leigh), 53 (same); *1973 Hearings* at 15 (testimony of Charles N. Brower).

The second source for interpreting the phrase "commercial activity" is the "very large body of case law which exist[ed]" in American law upon passage of the Act in 1976. *See 1976 Hearings* at 53 (testimony of Monroe Leigh). *See also id.* at 94 (testimony of Michael M. Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association of the United States). Testifying on an earlier version of the bill, Charles N. Brower, then Legal Adviser of the Department of State, stated:

> [T]he restrictive theory of sovereign immunity from jurisdiction, which has been followed by the Department of State and the courts since it was articulated in the familiar letter of Acting Legal Adviser Jack B. Tate of May 29, 1952, would be incorporated into statutory law. This theory limits immunity to public acts, leaving so-called private acts subject to suit. The proposed

---

24 *Hearings on H.R. 3493 before Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary*, 93d Cong., 1st Sess. 16 (1973) *("1973 Hearings")* (testimony of Charles N. Brower, Legal Adviser, Dep't of State), 40 (State Dep't Section-by-Section Analysis of 1973 bill). *See also House Report* at 6615.

25 *1976 Hearings* at 27 (testimony of Monroe Leigh).

legislation would make it clear that immunity cannot be claimed with respect to acts or transactions that are commercial in nature, regardless of their underlying purpose.

1973 Hearings at 15.[26] *See generally Petrol Shipping Corp.* v. *Kingdom of Greece,* 360 F.2d 103 (2d Cir.), *cert. denied,* 385 U.S. 931 (1966); *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965).[27] *But see Isbrandtsen Tankers, Inc.* v. *President of India,* 446 F.2d 1198 (2d Cir.) (State Dep't suggestion of immunity supersedes application of restrictive theory), *cert. denied,* 404 U.S. 985 (1971).

Finally, current standards of international law concerning sovereign immunity add content to the "commercial activity" phrase of the FSIA. Section 1602 of the Act, entitled "Findings and declaration of purpose," contains a cryptic reference to international law, but fails wholly to adopt it.[28]

---

26 The "Tate Letter" is set forth at 26 State Dep't Bull. 984 (1952).

27 Dictum in *Victory Transport, supra,* 336 F.2d at 359, and *Heaney* v. *Government of Spain,* 445 F.2d 501, 504 (2d Cir. 1971), states that a contract made by a government for a public purpose, *e.g.*, bullets for the army, is not "commercial activity." This aspect of prior American law has been overruled by the FSIA, and the definition of "commercial activity" has been concomitantly expanded to include such contracts. *See* 28 U.S.C. § 1603(d); *see also 1976 Hearings* at 95 (testimony of Michael M. Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association of the United States).

28 Section 1602 provides in part:

> Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States

The legislative history states that the Act "incorporates standards recognized under international law," *House Report* at 6613, and the drafters seem to have intended rather generally to bring American sovereign immunity practice into line with that of other nations. *See 1976 Hearings* at 25 (testimony of Monroe Leigh), 32 (testimony of Bruno A. Ristau); *1973 Hearings* at 18 (testimony of Charles N. Brower). At this point, there can be little doubt that international law follows the restrictive theory of sovereign immunity. *House Report* at 6613. *See, e.g.*, State Immunity Act, 1978, s. 3 (United Kingdom); Council of Europe, European Convention on State Immunity, art. 4 (1972), *reprinted in 1976 Hearings* at 37, 38; *Empire of Iran*, 45 I.L.R. 57 (1963) (West Germany).

Under each of these three standards, Nigeria's cement contracts and letters of credit qualify as "commercial activity." Lord Denning, writing in *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 369, 1 All E.R. 881, with his usual erudition and clarity, stated: "If a government department goes into the market places of the world and buys boots or cement—as a commercial transaction—that government department should be subject to all the rules of the marketplace." Nigeria's activity here is in the nature of a private contract for the purchase of goods. Its purpose—to build roads, army barracks, whatever—is irrelevant. Accordingly, courts in other nations have uniformly held Nigeria's 1975 cement purchase program and appurtenant letters of credit to be "commercial activity," and have denied the defense of sovereign immunity.[29] We

---

and of the States in conformity with the principles set forth in this chapter.

In the 1973 version of the bill, the word "chapter" was followed by "and other principles of international law."

29 *E.g.*, *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 1 All E.R. 881 (United Kingdom); *Hispano Americana*

find defendants' activity here to constitute "commercial activity," and we move on to the next step of analysis.

C. 1.

We need look no further than the third clause of § 1605(a)(2) to find statutory subject matter jurisdiction here. That clause provides: "A foreign state shall not be immune . . . in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The focus of our analysis is to determine whether "the act cause[d] a direct effect in the United States" within the meaning of the FSIA.[10] The "direct effect" clause has been

---

Mercantil S.A. v. *Central Bank of Nigeria*, [1979] 2 Lloyd's L.R. 277 (same); *Ipitrade International S.A.* v. *Federal Republic of Nigeria* (Int'l Chamber of Commerce Arbitration Award, April 25, 1978), *enforced* 465 F. Supp. 824 (D.D.C. 1978); *Youssef M. Nada Establishment* v. *Central Bank of Nigeria*, 16 Int'l Legal Mat. 501 (1977) (Dist. Ct., Frankfurt/Main, Aug. 25, 1976) (West Germany). *See also 1976 Hearings* at 76 & n.13 (statement of Committee on International Law, Assoc. of the Bar of the City of New York).

30 We need not belabor the point that the specific act or acts upon which these suits are based—the anticipatory repudiation of the cement contracts and letters of credit—took place at least in part "outside the territory of the United States." It was from Nigeria that Central Bank sent the instructions amending the letters of credit; it was in Nigeria that Nigeria instructed Central Bank to do so. Congress in writing the FSIA did not intend to incorporate into modern law every ancient sophistry concerning "where" an act or omission occurs. Conduct crucial to modern commerce—telephone calls, telexes, electronic transfers of intangible debits and credits—can take place in several jurisdictions. Outmoded rules placing such activity "in" one jurisdiction or another are not helpful here.

Moreover, should defendants establish that the "act" or "commercial activity" the action is "based upon" took place not "outside the territory of the United States" but inside it, then the first or second clauses of § 1605(a)(2) might become relevant. We need not decide the

the subject of considerable commentary,[31] but remains somewhat abstruse. The House Report, for example, states only that the direct effect clause "would subject [commercial] conduct [abroad] to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." *House Report* at 6618. The reference is a bit of a *non sequitur,* since § 18 concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts *n'importe quelle* substantive law.[32] Nor is the House Report's vague reference to the

---

question. Given Congress's broad approach in the language of § 1605(a)(2), it is not at all improbable that a suit could be brought under more than one clause. *See House Report* at 6618 (stating that all cases covered by second clause might also come within first clause), *1973 Hearings* at 42 (State Dep't Section-by-Section Analysis) (stating that § 1605(a)(2) covers all cases with an act or direct effect in United States). *See generally Gemini Shipping, Inc.* v. *Foreign Trade Organization for Chemicals and Foodstuffs, supra* note 5.

Moving to the second phrase of the clause, we have little doubt that the acts these actions are "based upon" were "in connection" with defendants' commercial activity. Breach of an agreement is necessarily performed "in connection with" that agreement, or with a series of similar agreements.

31 *E.g.*, Note, *Direct Effect Jurisdiction under the Foreign Sovereign Immunities Act of 1976,* 13 N.Y.U. J. Int'l L. & Pol. 571 (1981); Note, *Effects Jurisdiction under the Foreign Sovereign Immunities Act and the Due Process Clause,* 55 N.Y.U. L. Rev. 474 (1980) ("NYU Note"); Note, *The* Nikkei *Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act,* 4 Ford. Int'l L.J. 109 (1980).

32 As a result, certain limitations built into the text of § 18, such as the requirement that the "direct effect" be "substantial" or "foreseeable," are not necessarily apposite to the direct effect clause of § 1605(a)(2). To the extent the substantiality and foreseeability requirements of the legislative reach cases are designed to minimize unnecessary conflict between United States and foreign substantive law, 28 U.S.C. § 1606 renders the requirements irrelevant, since it implies that federal substantive law will not always govern in FSIA cases. *See generally Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 988, 991 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975).

District of Columbia's long-arm statute, D.C. Code Ann. § 13-423(a), especially helpful; that provision looks to personal jurisdiction, not subject matter jurisdiction, and in any event is concerned in its "effects" provision only with torts. We are left with the words, "direct effect in the United States," and with Congress's broad mandate in passing the FSIA: "Under section 1605(a)(2), no act of a foreign state, tortious or not, which is connected with the commercial activities of a foreign state would give rise to immunity if the act takes place in the United States or has a direct effect within the United States." *1973 Hearings* at 42 (State Department Section-by-Section Analysis of 1973 bill).

Fortunately, a certain amount of case law interprets both components of the problematic phrase: "direct" and "in the United States." For a paradigm of "direct," we look to the vivid examples of *Harris* v. *VAO Intourist, Moscow,* 481 F. Supp. 1056 (E.D.N.Y. 1979), and *Upton* v. *Empire of Iran,* 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.,* 607 F.2d 494 (D.C. Cir. 1979). In *Harris,* a man lost his life in a hotel fire; in *Upton,* a man was injured when the roof of a building collapsed on him. Both men undoubtedly suffered "direct" effects.

Applying the term to a corporation is not so simple. Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss. Accordingly, the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a "direct" financial loss. To discover whether breach of a contract causes this type of loss, we look to *Carey* v. *National Oil Corp.,* 592 F.2d 673, 676-77 (2d Cir. 1979) (*per curiam*). In *Carey,* we decided that a direct effect can arise not only from a tort, *e.g., Harris* and *Upton, supra,* but from cancellation of a contract for the sale of oil as well. Here, under either theory of recovery,

breach of the cement contracts or breach of the letters of credit, the effect of the suppliers was "direct." They were beneficiaries of the contracts that were breached. *See* Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. Rev. 474, 500-10 & n.192 (1980) ("NYU Note").

Finally, the most difficult aspect of the direct effect clause concerns its phrase, "in the United States." State law abounds with decisions locating "effects" for personal jurisdiction purposes. But those cases are not precisely on point, for they are concerned more with federalism, and less with international relations, than was Congress in passing the FSIA.[33] Reliance on state cases is not necessary here because the financial loss in these cases occurred "in the United States" for two much simpler reasons. First, the cement suppliers were to present documents and collect money in the United States, and the breaches precluded their doing so. Second, each of the plaintiffs is an American corporation. Whether a failure to pay a foreign corporation in the United States[34] or to pay an American corporation overseas[35]

---

33 It is, therefore, less than determinative here that New York law holds that the repudiation by a Ugandan bank of a letter of credit payable in New York creates a cause of action which "arises in New York" under the New York Business Corporations Law. *See J. Zeevi & Sons, Ltd.* v. *Grindlay's Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, *cert. denied*, 423 U.S. 866 (1976). *Compare Friedr. Zoellner (N.Y.) Corp.* v. *Tex Metals Co.*, 396 F.2d 300, 302 (2d Cir. 1968) (injury located at place of performance), *with Spectacular Promotions, Inc.* v. *Radio Station WING*, 272 F. Supp. 734, 737 (E.D.N.Y. 1967) (injury located where defendant acts).

34 Constitutional obstacles prevent our deciding the question in *Verlinden B. V.* v. *Central Bank of Nigeria*, *supra* note [illegible], decided this day.

35 *Harris* and *Upton* involved Americans injured overseas, but since the injured parties there were natural persons, not corporations, it is easy to locate the "effect" outside the United States. Whether an American corporation injured overseas incurs a direct effect in the United States remains an open question.

creates an effect "in the United States" under § 1605(a)(2) is not before us. Both factors are present here, and the subsection is clearly satisfied. *See* NYU Note at 510-13.

The foregoing analysis demonstrates that neither "direct" nor "in the United States" is a term susceptible of easy definition. A corporation is nor more than a series of conduits, filtering profit—or loss—through each stage from the company's customers to its shareholders, who may themselves be fictional entities as well. Harm to any component is somewhat "indirect," and locating the site of the injury, especially when the harm consists in an omission, is an enterprise fraught with artifice. Courts construing either term should be mindful more of Congress's concern with providing "access to the courts" to those aggrieved by the commercial acts of a foreign sovereign, *House Report* at 6605, than with cases defining "direct" or locating effects under state statutes passed for dissimilar purposes. Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention and the presence of attachable assets. Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regularize it. *See House Report* at 6605-06. The question is, was the effect sufficiently "direct" and sufficiently "in the United States" that Congress would have wanted an American court to hear the case? No rigid parsing of § 1605(a)(2) should lose sight of that purpose. We have no doubt that Congress intended to bring suits like these into American courts, *see House Report* at 6618, and we hold that statutory subject matter jurisdiction here exists.

2.

The final step in establishing the court's right to hear the claim is to find a constitutional basis for the statutory

exercise of subject matter jurisdiction. *See Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922). Each of these four suits is "between a State, or the Citizens thereof, and foreign States," U.S. Const., art. III, § 2, cl. 1, and therefore comes within the judicial power by way of the diversity grant. Indeed, it is to that clause that the drafters of the FSIA looked in securing a constitutional basis for FSIA suits generally. *See House Report* at 6611, 6632. *Cf. Verlinden B.V.* v. *Central Bank of Nigeria*, No. 80-7413, slip op. at ____ (2d Cir. Apr. 16, 1981) (suit by alien against foreign state not supported by constitutional diversity grant). The district court, we conclude, had the power to hear these claims.

D. 1.

Subsequent to the determination of subject matter jurisdiction is the issue of personal jurisdiction. The statutory aspects of the analysis are quite simple. Subsection 1330(b) provides for personal jurisdiction over the foreign state as to any claim the district court has power to hear under § 1330(a), so long as service has been made under § 1608.[36] Service here has been made, or at least not objected to. *See* Fed. R. Civ. P. 12(h)(1). Subject matter jurisdiction exists, so statutory personal jurisdiction exists as well.

---

[36] The House Report seems to require more, in its statement that, "The requirements of minimum jurisdictional contacts and adequate notice are embodied" in § 1330(b). *House Report* at 6612. *Accord, 1976 Hearings* at 96 (testimony of Michael M. Cohen). These statements are not in the Act itself, and are not by themselves sufficiently authoritative to introduce, *ipsissimis verbis*, the Fifth Amendment standard of due process into § 1330(b). Rather, the drafters in these words are merely confirming what they have no power to deny: that any exercise of personal jurisdiction under § 1330(b) is subject to the constitutional limitation of due process. *See 1976 Hearings* at 31 (testimony of Bruno A. Ristau).

2.

Turning to the constitutional constraints on personal jurisdiction, our first inquiry must be whether the safeguards of due process, which otherwise regulate every exercise of personal jurisdiction, apply to FSIA cases at all. Specifically, is a foreign state a "person" within the meaning of the due process clause? Cases on the point are rare, since pre-FSIA suits against foreign states were generally brought *quasi in rem,* and the due process clause was not uniformly applied to *quasi in rem* suits until 1977, a year after the FSIA was passed. *See Shaffer* v. *Heitner,* 433 U.S. 186 (1977). Nonetheless, in *Amoco Overseas Oil Co.* v. *Compagnie Nationale Algerienne de Navigation,* 605 F.2d 648 (2d Cir. 1979), a *quasi in rem* suit filed before the FSIA and decided after *Shaffer,* we applied constitutional due process analysis to a suit against a foreign state. We affirm that holding today. *Thos. P. Gonzalez Corp.* v. *Consejo Nacional de Produccion de Costa Rica,* 614 F.2d 1247 (9th Cir. 1980) (applying due process clause in suit against foreign state *in personam*); *Petrol Shipping Corp.* v. *Kingdom of Greece, supra,* 460 F.2d at 110 (same); *Purdy Co.* v. *Argentina,* 333 F.2d 95, 98 (7th Cir. 1964) (same); *Rovin Sales Co.* v. *Socialist Republic of Romania,* 403 F. Supp. 1298, 1302 (N.D. Ill. 1975) (same); *T.J. Stevenson & Co.* v. *81,193 Bags of Wheat Flour,* 399 F. Supp. 936, 938 (S.D. Ala. 1975) (same) (counterclaim).

Since the constitutional constraints apply here, our next concern must be to delineate the contacts that are relevant. The inquiry has two aspects: whose contacts, and with what? To bring any defendant before the court, of course, the due process analysis must be satisfied as to him. Nonetheless, it is not only defendant's activities in the forum, but also actions relevant to the transaction by an agent on

defendant's behalf, which support personal jurisdiction. *Gelfand* v. *Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968); *Frummer* v. *Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 538, 281 N.Y.S.2d 41, 44-45, 227 N.E.2d 851, 854, *cert. denied*, 389 U.S. 923 (1967). Under the *Gelfand* standard, Central Bank's activities with respect to the "commercial activity" are chargeable to Nigeria, and Morgan's activities are chargeable to both. If Morgan had not performed for Central Bank, and Central Bank for Nigeria, the entire payment mechanism supporting the cement contracts, Nigeria would have been required to make the payments directly. *See Gelfand, supra*, 385 F.2d at 121. Since service was made under § 1608, the relevant area in delineating contacts is the entire United States, not merely New York. *Compare* 28 U.S.C. § 1608 (service of process provision for FSIA) *with* 15 U.S.C. §§ 21(f) (service of process provision for antitrust laws), 77v (same for securities laws). *See Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 998-1000 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *Mariash* v. *Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972).

Whether a defendant's contacts with the forum are so numerous that they reach the "minimum contacts" required by *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), depends broadly on whether "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316, *citing Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940). That standard, in turn, involves at least four separate inquiries. Under the cases from *International Shoe* to *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), the court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United

States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit. *See World-Wide Volkswagen Corp.* v. *Woodson, supra,* 444 U.S. at 292, 297; *Kulko* v. *California Superior Court,* 436 U.S. 84, 97-98 (1978); *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958); *McGee* v. *International Life Insurance Co.,* 355 U.S. 220, 223 (1957); *International Shoe Co., supra,* 326 U.S. at 316.

The facts of these cases establish that Central Bank, and through Central Bank Nigeria, repeatedly and "purposefully avail[ed themselves]" of the privilege of conducting activities in the United States. *Hanson* v. *Denckla, supra,* 357 U.S. at 253, *citing International Shoe Co., supra,* 326 U.S. at 319. Central Bank alone sent its employees to New York for training, kept large cash balances here, and maintained a custody account as well. If Morgan had converted Central Bank's funds from either account, New York law would have protected Central Bank, and allowed it to sue. Central Bank made it a regular practice to advise letters of credit through Morgan, and to use Morgan as its means of paying bills throughout the world. New York law protected Central Bank in each of its instructions, transfers, and withdrawals. Central Bank's activities with respect to the cement contracts and the letters of credit, directly chargeable to Nigeria under *Gelfand,* show the same pattern. In Nigeria's behalf and on Nigeria's instructions, Central Bank advised each of the letters of credit through Morgan, in the United States, regardless of the individual supplier's wishes. Having chosen American law and process as their protectors, Nigeria and Central Bank were not hesitant to invoke them; at the mere hint Morgan was reluctant to honor defendants' amendments to the letters of credit, an officer of Central Bank threatened to "go to court" to enforce them.

Having so thoroughly "invok[ed] the benefits and protections of [American] laws," *Hanson* v. *Denckla, supra,* 357 U.S. at 253, Nigeria and Central Bank would have every "reason to expect to be haled before a . . . court" here. *Shaffer* v. *Heitner, supra,* 433 U.S. at 216. Having threatened litigation on their own, and having been notified of its likelihood by Morgan, defendants cannot now assert they could not have expected it. Moreover, the very function of the due process clause is to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson, supra,* 444 U.S. at 297. In light of defendants' intentional activities in the United States, litigation was clearly foreseeable here.

Although the United States is certainly distant from Nigeria, litigation here is not unduly inconvenient for defendants. Every modern transnational commercial contract presents problems of adjudicatory cost; in the cement purchase program, where Nigeria bargained with corporations from a plethora of nations, required in the contracts that the goods came mostly from Europe, and provided in some letters of credit that payment was to be made in the United States, the inconvenience was at least expected. Moreover, Nigeria in the cement contracts agreed to submit to arbitration by the International Chamber of Commerce ("ICC"). The ICC's headquarters are in Paris, but its arbitrations can take place anywhere in the world. *See* ICC, *ICC Arbitration—The International Solution to Business Disputes,* art. 12 (undated). Further, any assertion of inconvenience here is belied by defendants' constant resort to the United States for a myriad of services, and by the frequent visits of Central Bank officials to Morgan in New York. *Cf. World-Wide Volkswagen Corp.* v. *Woodson, supra,* 444 U.S. at 297.

In *McGee* v. *International Life Insurance Co.*, the Supreme Court depended in part on the forum's "manifest interest in providing effective means of redress for its residents . . . ." 355 U.S. at 223. Here, we should not be unmindful that Congress has passed the FSIA specifically to provide "access to the courts." *House Report* at 6605. Similarly, the plaintiff has an "interest in obtaining convenient and effective relief." *World-Wide Volkswagen Corp.* v. *Woodson, supra,* 444 U.S. at 292, *citing Kulko* v. *California Superior Court, supra,* 436 U.S. at 92. *See generally Plant Food Co-op* v. *Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155, 158-60 (9th Cir. 1980); *Pedi Bares, Inc.* v. *P & C Food Markets, Inc.*, 567 F.2d 933, 936-38 (10th Cir. 1977); *Product Promotions, Inc.* v. *Cousteau,* 495 F.2d 483, 494-98 (5th Cir. 1974). Accordingly, we hold that defendants' relation to the forum here satisfies the "minimum contacts" requirement of *International Shoe. Sterling National Bank & Trust Co. of New York* v. *Fidelity Mortgage Investors,* 510 F.2d 870 (2d Cir. 1975).[37]

---

[37] We recognize that *International Shoe* and its progeny were decided under the due process clause of the Fourteenth Amendment, while this case falls within the purview of the similar clause in the Fifth Amendment. In *Leasco Data Processing, supra,* a Fifth Amendment case, we applied the Fourteenth Amendment analysis, *see* 468 F.2d at 1340, but we added that the assertion of personal jurisdiction "must be applied with caution, particularly in an international context," *id.* at 1341, *citing* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121, 1127 (1966). *See also Bersch* v. *Drexel Firestone, Inc., supra,* 519 F.2d at 1000. *See generally Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 383 (1959). While circumspection is appropriate in transnational disputes, certain other factors which might limit the exercise of personal jurisdiction are not present in such suits. The concerns of federalism discussed at length by the Supreme Court in *Shaffer, supra,* 433 U.S. at 216-17, and *World-Wide Volkswagen Corp., supra,* 444 U.S. at 292, for example, would not be relevant in an FSIA suit since states within a federal system, strictly speaking, are not involved. Further, more or less solicitude might be in order because defendant is a government, not a natural person or corporation.

(footnote continued)

III.

Our rulings today vindicate more than Congressional intent. They affirm the right of all participants in the marketplace of the world to be treated as equals, and to ascribe to principles of trade which found their birth in the law merchant, centuries ago. Corporations can enter contracts without fear that the defense of sovereign immunity will be inequitably interposed, and foreign states can bargain without paying a premium required by a trader in anticipation of a judgment-proof client. Commerce is fostered, and all interests are advanced.

In *Nikkei, East Europe,* and *Chenax,* the district court held jurisdiction to be present, and proceeded to the trial of plaintiffs' claims. We find no error in its rulings on the merits, and affirm those three judgments in full.[38] In *Texas*

We find neither distinction dispositive here. Like the states of our nation, the United States is a member of an international community. While it has not formally renounced part of its long-arm power by signing an international constitution, considerations of fairness nonetheless regulate every exercise of the federal judicial machinery. *See* Restatement of the Law, Second, Foreign Relations Law of the United States § 37 (1965); von Mehren & Trautman, *supra,* 79 Harv. L. Rev. at 1125 n.8. The analogy between the national and international systems may not be sufficiently exact to lead to the same result in every case, but here we see no reason to stray from our former adherence to the analysis developed under the Fourteenth Amendment. Similarly, "we see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation." *Victory Transport, Inc., supra,* 336 F.2d at 363.

[38] Having lost the sovereign immunity decision and the jurisdictional questions, defendants attempt to place a further obstacle in the way of the speedy adjudication of the claims against them: the act of state doctrine. We decline to apply it here. Our decision does not depend on a determination that this case falls within one of the several purported "exceptions" to the rule. Act of state analysis depends upon a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682, 728 (1976) (Marshall, *J., dissenting*); *see Banco Nacional*

Trading, the district court ordered the complaint dismissed for lack of jurisdiction. That order is reversed, and the case is remanded for proceedings consistent with this opinion.

---

de Cuba v. *Sabbatino,* 376 U.S. 398, 428 (1964). Here, adjudication of the legality of Nigeria's and Central Bank's challenged conduct does not threaten to embarrass the executive branch in its conduct of United States foreign relations, and hence does not seriously implicate the relevant policy considerations. These cases contain none of the elements that other courts have viewed to contain the seeds of such embarrassment. We are not being asked, as the Court was in *Sabbatino,* to judge a foreign government's conduct under ambiguous principles of international law. These are not cases where the challenged governmental conduct is public rather than commercial in nature, *see Alfred Dunhill of London, Inc.* v. *Republic of Cuba, supra,* or where its purpose was to serve an integral governmental function, *cf. Hunt* v. *Mobil Oil Corp.,* 550 F.2d 68, 78 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977) (applying act of state doctrine where governmental conduct in question was part of "a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants"). Finally, the executive branch has not stated its views in these cases regarding either the propriety of applying the act of state doctrine, as in *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972), or the validity of the very governmental act *sub judice,* as in *Hunt* v. *Mobil Oil Corp., supra,* 550 F.2d at 77.

Judgment of the United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of April, one thousand nine hundred and eighty-one.

Present:

HON. IRVING R. KAUFMAN,
HON. WILLIAM H. TIMBERS,
Circuit Judges
HON. ROBERT J. WARD,
District Judge

#80-7783, 80-7771, 80-7773, 80-7813, 80-7703, 80-7803

TEXAS TRADING & MILLING CORPORATION,
Plaintiff-Appellant,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Defendants-Appellees.

DECOR BY NIKKEI INTERNATIONAL, INC.,
d/b/a NIKKEI INTERNATIONAL, INC.,
Plaintiff-Appellant-Cross-Appellee,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Defendants-Appellees-Cross-Appellants.

Judgment of the United States Court of Appeals for the Second Circuit

CHENAX MAJESTY, INC.,
Plaintiff-Appellant-Cross-Appellee,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Defendants-Appellees-Cross-Appellants.

EAST EUROPE IMPORT EXPORT, INC.,
Plaintiff-Appellant-Cross-Appellee,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Defendants-Appellees-Cross-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of Judge Cannella is reversed and the case remanded and the judgments entered on orders of Judge Pierce are affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

/s/ ARTHUR HELLER
by Arthur Heller,
Deputy Clerk

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of August, one thousand nine hundred and eighty-one.

Nos. 80-7703, 80-7771, 80-7773, 80-7783, 80-7803, 80-7811, 80-7813.

TEXAS TRADING & MILLING CORP.,
Plaintiff-Appellant,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Defendants-Appellees.

DECOR BY NIKKEI INTERNATIONAL, INC.,
d/b/a NIKKEI INTERNATIONAL, INC.,
Plaintiff-Appellee-Cross-Appellant,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Defendants- Appellants-Cross-Appellees.

CHENAX MAJESTY, INC.,
Plaintiff-Appellant-Cross-Appellee,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Defendants-Appellees-CrossAppellants.

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

EAST EUROPE IMPORT-EXPORT, INC.,
Plaintiff-Appellee-Cross-Appellant,

v.

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Defendants-Appellants-Cross-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants, Federal Republic of Nigeria and Central Bank of Nigeria,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO

A. Daniel Fusaro,
Clerk

by Francis X. Gindhart
Chief Deputy Clerk

Opinion of United States District Court in *Texas Trading* Action

No. 78 Civ. 2395(JMC).

TEXAS TRADING & MILLING CORP.,

Plaintiff,

v.

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

United States District Court,
S. D. New York.

July 16, 1980.

As Amended Aug. 18, 1980.

MEMORANDUM AND ORDER

CANNELLA, District Judge:

The defendants' motion to dismiss the complaint for lack of subject matter and personal jurisdiction is granted. Fed.R.Civ.P. 12(b)(1), (2).

FACTS

Plaintiff, a New York corporation with its principal place of business in New York City, has commenced this

action under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391, 1441, 1601-1611, for anticipatory breach of a contract for the purchase of cement and of a documentary letter of credit established pursuant to that contract. On March 8, 1975, plaintiff entered into a contract with the Federal Republic of Nigeria ["Nigeria"], wherein Nigeria agreed to buy from plaintiff 240,000 metric tons, plus or minus 10% at seller's option, of Portland Cement for the price of $60 (U.S.) per ton, or a total of $14,400,000. Nigeria agreed to establish within 21 days after the contract was signed, "an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Fidelity International Bank of 99 William Street, New York, U.S.A." Defendants' Notice of Motion, Exhibit 2, at 2 (filed Dec. 20, 1979). Shipment was to be made at the rate of 20,000 metric tons *per mensem* commencing 30 days after receipt of the letter of credit. The contract provided for the payment of demurrage not exceeding $4,000 *per diem* per vessel, whenever the discharge of cargo was not completed at the rate of at least 1,000 tons *per diem*, provided the seller gave notice to the buyer of the departure from the port of loading of each consignment. Demurrage was to be payable, under the terms of the letter of credit, on presentation at the bank of time-sheets and statements of facts duly certified as correct by the ship's master and the ship's agents in Lagos Apapa, the main port of Nigeria. The contract further provided that it would be governed by the laws of Nigeria, and that all disputes arising under

it would be submitted to arbitration before the International Chamber of Commerce, Paris, France.

On April 23, 1975, the Central Bank of Nigeria ["Central Bank"], which is an "agency or instrumentality of a foreign state" within the meaning of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b), established and confirmed its Documentary Credit No. CBN/BO/75/86 in favor of plaintiff for the full contract price. The letter of credit is governed by the Uniform Customs and Practice for Documentary Credits (The International Chamber of Commerce Brochure No. 222) (1962 Revision). The confirmed, irrevocable letter of credit was advised and made payable through Morgan Guaranty Trust Company ["Morgan"] in New York, with instructions that the credit be advised through Fidelity International Bank in New York. Morgan did not, however, add its own confirmation to the letter of credit.

Plaintiff alleges that it thereafter entered into a contract with a Spanish supplier for the purchase of 240,000 metric tons of Portland Cement, and delivered 39,590 metric tons to Nigeria. During the course of these deliveries, $4,484,476.87 in demurrage was incurred, of which $2,102,305.20 was paid by Nigeria.

Plaintiff's cement purchase contract was only one in a massive cement purchase program undertaken by Nigeria's Ministry of Defense.[1] What the Ministry appears not to

1. Nigeria entered into approximately sixty-eight contracts with international suppliers for an aggregate of over twenty million metric tons of Portland Cement. *See National American Corp. v. Federal Republic of Nigeria*, 448 F.Supp. 622 (S.D.N.Y.1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

have anticipated, however, is that the huge quantities of cement ordered exceeded the unloading capacity of Nigeria's deep water ports, so that by August 1975, Nigerian ports were so congested with vessels carrying cement that other essential imports could not be unloaded. To deal with this problem, a new Nigerian government issued regulations that required every ship intending to enter a Nigerian port to notify the Nigerian Port Authority two months prior to its departure in order to obtain approval of its arrival date. No ship could thereafter enter a Nigerian port without prior approval. *See* Defendants' Notice of Motion, Exhibits 10, 11. Plaintiff contends that these actions by the defendants constitute an anticipatory breach of the contract.

In mid-September 1975, Central Bank informed its correspondent banks, including Morgan, that it had unilaterally amended all irrevocable letters of credit issued in connection with the cement contracts. On September 30, 1975, Morgan cabled plaintiff to advise that Morgan had been directed to stop demurrage payments against documents unless they had been sent to and certified for payment by Central Bank. Plaintiff was further advised that no payments would be made for those shipments that were not cleared and approved two months prior to their arrival, and plaintiff was invited to meet with Nigeria's Cement Contracts Negotiating Committee. *See id.*, Exhibit 7. There is no doubt that this unilateral amendment of the irrevocable letter of credit violated the provisions of Article 3 of the Uniform Customs and Practice for Documentrary Credits. *See id.*, Exhibit 9.

Although not alluded to in plaintiff's complaint, in January 1976, plaintiff's president met with the Cement Contracts Negotiating Committee which was established by the Nigerian Government for the purpose of renegotiating the cement contracts. *See id.*, Exhibit 10, ¶ 5. Plaintiff contends that under conditions that amounted to economic duress, it was forced to enter into a settlement agreement with the Negotiating Committee which reduced the demurrage rate and cancelled the letter of credit and the balance of the cement contract. *See* Affidavit of Richard L. Trotman, ¶ 7 and Exhibit D (filed April 21, 1980). Plaintiff further contends that, even were the Court to conclude that the settlement agreement is valid, there are still substantial amounts of demurrage payments owed to plaintiff under the settlement. *See* Affidavit of Richard H. Webber, ¶ 4 (filed April 21, 1980).

As a result of the alleged breach of the contract and letter of credit, plaintiff seeks to recover damages for loss of profits on the sale of 200,410 metric tons of Portland Cement in the amount of $1,382, 829 and unpaid demurrage in the amount of $2,382,171.67, as well as reasonable attorney's fees, costs and expenses. The defendants now move to dismiss the complaint on the grounds that this Court lacks subject matter and personal jurisdiction, Fed.R. Civ.P. 12(b)(1), (2), and that the complaint fails to state a claim upon which relief can be granted because of the alleged settlement agreement, Fed.R.Civ.P. 12(b)(6).

DISCUSSION

Plaintiff alleges that this Court has jurisdiction under the Foreign Sovereign Immunities Act of 1976 ["the Immunities Act"], 28 U.S.C. §§ 1330, 1391, 1441, 1601-1611. The Immunities Act provides the district courts with both subject matter and personal jurisdiction over nonjury civil actions against foreign states, in actions in which, pursuant to 28 U.S.C. §§ 1605-1607, foreign states are not immune. *Id.* § 1330. In this respect, the Immunities Act codifies the "restrictive" principle of sovereign immunity which affords immunity to a foreign state's public acts, but not to suits based upon its commercial or private acts. *See* H.R.Rep.No.94-1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S.Code Cong. & Admin.News. pp. 6604, 6605 ["the House Report"]. The Act operates as a federal long-arm statute over foreign states and their instrumentalities, and embodies the due process requirements of minimum jurisdictional contacts and adequate notice. *Id.* at 13, *reprinted in* [1976] U.S.Code Cong. & Admin.News at 6612. The Act, however, "authorize[s] the exercise of less than the complete personal jurisdiction that might constitutionally be afforded American courts under traditional concepts of fairness and due process." *Harris v. VAO Intourist, Moscow*, 481 F.Supp. 1056, 1059 (E.D.N.Y. 1979).

> Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity

> from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

House Report at 13, *reprinted in* [1976] U.S.Code Cong. & Admin.News at 6612.

Although the allegations of plaintiff's complaint predicate jurisdiction upon the defendants' alleged conduct of commercial activity within the United States through their purported agent, Morgan, plaintiff appears to have abandoned that theory,[2] and now relies on the portion of section 1605(a)(2) that provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .;
>
> (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28U.S.C. § 1605(a)(2).[3]

---

2. In *Verlinden B. V. v. Central Bank of Nigeria*, 488 F.Supp. 1284, at 1296-97 (S.D.N.Y.1980), Judge Weinfeld concluded that the establishment of a letter of credit which was advised through Morgan, a New York bank, did not constitute commercial conduct carried on in the United States by the defendants since it did not involve "substantial contact" with the United States as required by 28 U.S.C. § 1603(e).

3. Section 1605(a)(2) defines two other "commercial activity" situations in which a foreign state is not entitled to immunity. These are when:

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in

(footnote continued on next page)

The term "commercial activity" is defined by the Immunity Act as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). *See* House Report at 16, *reprinted in* [1976] U.S.Code Cong. & Admin.News at 6614-15.

---

the United States in connection with a commercial activity of the foreign state elsewhere . . . .

28 U.S.C. § 1605(a)(2).

In its Memorandum of Law at 13-14 (filed April 21, 1980), plaintiff asserts, however, that Nigeria implicitly waived its sovereign immunity by contractually agreeing to arbitrate disputes arising under the contract in France. While there is some support for plaintiff's argument at least with respect to Nigeria, if not the Central Bank, *see* House Report at 7, *reprinted in* [1976] U.S.Code Cong. & Admin. News at 6617; *Ipitrade International, S.A. v. Federal Republic of Nigeria*, 465 F.Supp. 824 (D.D.C.1978), the Court declines to adopt such reasoning. An agreement that the contract will be governed by the law of another country or submitted to arbitration in another country does not reflect an intention to waive governmental immunity to actions brought against the foreign state in the courts of the United States.

> Plaintiff's view, if adopted, would presage a vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations: whenever a foreign sovereign had contracted with a private party anywhere in the world, and chose to be governed by the laws or answer in the forum of any country other than its own, it would expose itself to personal liability in the courts of the United States. [The parties to the contract] could scarcely have foreseen this untoward result when they signed the contract; and it is unlikely that Congress could have intended it.

Verlinden B. V. v. Central Bank of Nigeria, supra, 488 F.Supp. at 1302.

The defendants assert that jurisdiction does not exist under this section because the defendants' acts abroad did not have a "direct effect" in the United States as contemplated by the Immunities Act, and because the acts giving rise to plaintiff's claim, the embargo and unilateral amendment of the letter of credit, were acts of state[4] rather than commercial in nature. The Court will address only the first of the defendants' objections since it finds that the "direct effect" requirement of section 1605(a)(2) has not been met in this case.

Even if the defendants' embargo, unilateral amendment of the letter of credit, and alleged breach of the settlement agreement, are commercial activities, the language of the statute still requires that such conduct occurring outside the United States have a "direct effect" in the United States. While the meaning of "direct effect" in this context is less than clear, it does indicate that an examination of the defendants' contacts with the United States in connection with the specific transaction at issue is required. *See East Europe Domestic International Sales Corp. v. Terra*, 467 F.Supp. 383, 388 (S.D.N.Y.), *aff'd mem.*, 610 F. 2d 806 (2d Cir. 1979).

The House Report affords some guidance by explaining that the Immunities Act would subject foreign states to the jurisdiction of United States courts when consistent with the principles of section 18, *Restatement (Second) of For-*

4. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed. 2d 477 (1977).

eign Relations Laws of the United States (1965), which provides:

> Jurisdiction to Prescribe With Respect to Effect Within Territory.
>
> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Id.

The House Report suggests that further guidance is provided by the District of Columbia's long-arm statute.[5]

5. The long-arm provision of the District of Columbia provides in pertinent part:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to *a claim for relief from the person's*—
>
> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;

(footnote continued on next page)

House Report at 13, *reprinted in* [1976] U.S.Code Cong. & Admin.News at 6612; *see Harris v. VAO Intourist, Moscow, supra,* 481 F.Supp. at 1063. In *Harris,* Judge Weinstein described the problems that attend any comparison of the Immunities Act with more familiar jurisdictional statutes:

> Ascertaining the meaning of "direct effect" and the interpretation of section 1605(a)(2) are difficult because the jurisdictional statutes on which section 1605(a)(2) was patterned are, as a comparison of the Act and relevant statutes show, quite different in approach. Although they focus on the contacts of the non-resident, the Virginia, Maryland and District of Columbia statutes, in effect, make distinctions based on traditional classifications of causes of action such as "commercial"—e. g., contract—and "tort"—e. g., negligence, products liability and libel. *See* Note, The Virginia "Long Arm" Statute, 51 Virginia L.Rev. 719, 732 (1965).
>
> In contrast, the Foreign Sovereign Immunities Act is grounded in the history of the State Department's

---

(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

(5) having an interest in, using, or possessing real property in the District of Columbia; or

(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

13 D.C.Code § 13-423 (1973).

attempts to regularize our courts' treatment of foreign state agencies. The basic distinction is between "governmental" and "commercial" activity. *See* "Tate Letter" to Acting Attorney General Perlman, 26 Dept. State 984 (1954). The "immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." H.R.Rep.No.94-1487, 94th Cong., 2d Sess. 13, *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 6604, 6605. . . .

* * *

Thus, because of the structure and history of the Immunities Act, it does not reflect the same classifications used by the District of Columbia and similar long-arm statutes. Included in the concept of "commercial activity," as used in the third cause [*sic*] of section 1605(a)(2), are actions which would be characterized as contractual or tortious arising from the "commercial" governmental activities of foreign state-owned entities. The third clause of section 1605(a)(2) encompasses tortious acts outside the United States related to commercial activity (as opposed to governmental activity), having direct effects in the United States.

This interpretation and the legislative history already adverted to would suggest that section 13-423 (a)(4) of the District of Columbia statute dealing with tortious acts or omissions outside the District causing tortious injury within the District provides the strongest analogy to the direct effect clause of section 1605 (a)(2) in a factual situation such as the one before us.

Id. at 1063-64.

As difficult as analogies are in this context, the import of both section 18 and comparisons to the District of Columbia's long-arm statute is that the "direct effect" requirement of section 1605(a)(2) is fulfilled only where there are significant contacts between the transaction underlying the cause of action and the United States.

Thus, in *Harris,* Judge Weinstein concluded that defendants' alleged acts of negligence in causing the death of plaintiff's American decedent in a Moscow hotel fire did not cause a "direct effect" in the United States within the meaning of the third exception to section 1605(a)(2), since the only contact with the forum was an "injurious consequence" of conduct occurring outside the United States. *Id.* at 1064-65; *accord, Upton v. Empire of Iran,* 459 F.Supp. 264 (D.D.C.1978), *aff'd* 607 F.2d 494 (D.C.Cir.1979).

In the present case, all negotiations of the contract and subsequent settlement agreement between the parties were carried on outside the United States and the contract is governed by Nigerian law. Even if the Court assumes that the parties did not enter into a binding settlement agreement which superseded the original cement purchase contract and letter of credit, the only effect in the United States asserted by plaintiff is that the letter of credit was payable in New York to plaintiff, a New York corporation, through a New York correspondent bank of the Central Bank. A letter of credit payable in New York is an accommodation to plaintiff. Its existence does not present a materially different situation from that which exists when a contract calls for payment of the contract price to a New York plaintiff in

New York.[6] In that situation, as in this, the purported injury caused by the breach of contract takes place in the United States "only because the plaintiff is domiciled or doing business here." This, however, "is an insufficient contact for due process purposes." *East Europe Domestic International Sales Corp. v. Terra, supra,* 467 F.Supp. at 390. While the defendants' alleged breach of the contract and letter of credit may have had foreseeable effects in the United States, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295, 100 S.Ct. 559, 566, 62 L.Ed.2d 490 (1980). Furthermore, the House Report clearly indicates, albeit in the context of the "commercial activity carried on in the United States" exception, that Congress intended to bestow jurisdiction only in cases in which there is "a degree of contact *beyond* that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." House Report

6. The letter of credit in this case is an engagement or guarantee undertaken by the Central Bank in Nigeria. The Central Bank guaranteed that amounts due under the cement contract would be paid to plaintiff upon presentation of the appropriate documents at the advising bank, Morgan. Morgan, however, acted only as a correspondent bank, and did not confirm or guarantee the irrevocable letter of credit issued by the Central Bank so that Morgan's contacts with New York have no jurisdictional significance.

In effect, plaintiff alleges a breach of two separate agreements: (1) Nigeria's breach of the cement contract which was occasioned by the embargo and subsequent non-payment of moneys due thereunder, and (2) the Central Bank's breach of the terms of the letter of credit by amending the terms of the irrevocable letter of credit unilaterally. The only contact of either transaction with the United States relates to payments to be made to plaintiff in New York because of the purely fortuitous circumstance that it is a New York corporation.

at 17, *reprinted in* [1976] U.S.Code Cong. & Admin.News at 6616 (emphasis added).

To the extent that this result is inconsistent with the opinions in *National American Corporation v. Federal Republic of Nigeria*, 448 F.Supp. 622, 639 (S.D.N.Y.1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979) and *Verlinden B. V. v Central Bank of Nigeria, supra*, 488 F.Supp. at 1299, the Court notes that each case is distinguishable. In *National American Corporation*, jurisdiction was based upon a quasi-in-rem attachment of Nigeria's assets. In *Verlinden*, plaintiff was a Dutch corporation and the locus of injury was outside the United States, which dispelled any possibility of a finding of "direct effect" inside the United States. Therefore, these cases are inapposite here.[7]

Furthermore, plaintiff's reliance upon *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979), is misplaced. In that case, a Bahamian subsidiary of the New York plaintiff had entered into a contract for the delivery of oil with a company owned by the Government of Libya. In an action by

7. Furthermore, the Court declines to follow former Magistrate Sol Schreiber's recommendation in *East Europe Import-Export, Inc. v. Federal Republic of Nigeria and Central Bank of Nigeria*, 77 Civ. 2809 (LWP) (filed Sept. 19, 1978) and two consolidated Nigerian cement cases which are currently pending before Judge Pierce. *See* Defendants' Notice of Motion, Exhibit 12. In those cases, where the plaintiffs are New York corporations, Judge Pierce confirmed the Magistrate's finding that the alleged breach of a letter of credit payable in New York through a New York correspondent bank of the Central Bank caused a "direct effect" in the United States within the meaning of section 1605(a)(2). The defendants, however, have renewed their sovereign immunity arguments in their post-trial memoranda, and those actions are currently *sub judice*. Since there has been no final judgment in the consolidated actions before Judge Pierce, plaintiff's contention that the Magistrate's finding should collaterally estop the defendants from relitigating the issues decided therein is without merit.

the parent company and an assignee of the subsidiary for non-delivery of the oil, the Second Circuit found no "direct effect" in the United States under section 1605(a)(2). Contrary to plaintiff's interpretation, *Carey* does not stand for the proposition that a breach of contract will have a "direct effect" in the United States in all cases where plaintiff is a party to the contract and is domiciled or doing business in the United States. The Second Circuit noted that section 1605(a)(2) embodies the due process standard set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), which states that a defendant over whom jurisdiction is sought must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantive justice.' " *Carey v. National Oil Corp., supra*, 592 F.2d at 676. As in *Carey*, there is no indication in the present case that the defendants purposefully availed themselves of the privilege of conducting business in the United States either by injecting products into United States markets, a possible jurisdictional contact noted in *Carey*, or otherwise. *Carey v. National Oil Corp., supra*, 592 F.2d at 677 n.8. *See also Hanson v. Denkla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958). Since the allegations of plaintiff's complaint do not fulfill the "minimum contacts" requirements of *International Shoe* and its progeny,[8] they cannot reach the level of "direct

8. *See Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

effect" described in section 1605(a)(2). *Carey v. National Oil Corp., supra,* 592 F.2d at 677.

CONCLUSION

Accordingly, the defendants' motion to dismiss the complaint for lack of subject matter and personal jurisdiction is granted. Fed.R.Civ.P. 12(b)(1), (2). The Clerk of the Court is directed to prepare and enter a Judgment dismissing the complaint.

SO ORDERED.

Judgment of United States District Court in *Texas Trading* Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civil 2395(JMC)

TEXAS TRADING & MILLING CORP.,

Plaintiff,

against

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

Defendants having moved the Court pursuant to Rule 12(b)(1)(2), of the Federal Rules of Civil Procedure, and the said motion having come before the Honorable John M. Cannella, U.S.D.J., and the Court thereafter on July 21, 1980, having handed down its memorandum and order granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
July 23, 1980

/s/ RAYMOND F. BURGHARDT
Clerk

Opinion of United States District Court in *Nikkei* and *East Europe* Actions

Nos. 77 Civ. 2348 (LWP), 77 Civ. 3045 (LWP) and 77 Civ. 2809 (LWP).

DECOR BY NIKKEI INTERNATIONAL, INC., d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

v.

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

CHENAX MAJESTY, INC.,

Plaintiff,

v.

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

v.

FEDERAL REPUBLIC OF NIGERIA and CENTRAL BANK OF NIGERIA,

Defendants.

United States District Court,
S. D. New York.

Aug. 18, 1980.

Opinion of United States District Court in Nikkei and East Europe Actions

PIERCE, District Judge.

OPINION AND ORDER

These are diversity actions for alleged breaches of contract. Plaintiffs are three independent corporate entities. In early 1975, they each separately contracted to provide the Federal Military Government of the Federal Republic of Nigeria with quantities of bagged cement. They each contend that thereafter in the fall of 1975 their contracts were anticipatorily breached. Each plaintiff seeks to recover the profits it contends it would have earned in the performance of its contract had the alleged breach not occurred. Each plaintiff also seeks to recover its alleged lost profits on the ground that three separate letters of credit issued by defendant Central Bank of Nigeria for their respective individual benefits was unilaterally modified without the consent of the plaintiffs. The letters of credit were issued by the Central Bank of Nigeria pursuant to the terms of the contracts in controversy. Finally, plaintiffs seek to recover the profits they contend each would have earned as demurrage payments, and they also seek to obtain incidental damages, punitive damages, and interest.

These claims of the plaintiffs were tried to this Court commencing on September 10, 1979. The following discussion shall constitute the findings of fact and conclusions of law of the Court in this matter.

FINDINGS OF FACT

In 1975, the government of Nigeria, through the Nigerian Federal Ministry of Defense, entered into more than

70 contracts with foreign cement suppliers as part of its program to purchase 16 to 18 million metric tons of cement. See Defendants' Proposed Findings of Fact and Conclusions of Law ¶¶ 147, 205. All of the cement purchased by the Nigerian government through these contracts was to be delivered to Nigeria over an eighteen month period dur- the years 1975 and 1976. Id. ¶¶ 147, 165. Pursuant to these contracts, the Central Bank of Nigeria ("CBN") established individual letters of credit in favor of at least some of the cement suppliers, including the plaintiffs herein. The bank is an agency of the Nigerian government.

In mid-1975, the Nigerian ports became severely congested with ships seeking to discharge their cargos. Threatened with a national economic disaster because of this congestion, the Nigerian government placed an embargo on all shipping into the port of Lagos. *National American Corp. v. Federal Republic of Nigeria*, 597 F.2d 314, 316 (2d Cir. 1979). Thereafter, the national government established a negotiating committee which was responsible for renegotiating the foreign cement contracts and related letters of credit on behalf of the government and CBN. Id. More than 70 of the cement suppliers met with the negotiating committee, and at least 43 accepted the terms of a proposed settlement agreement, thereby releasing the government from its obligations under the cement contracts. See Defendants' Proposed Findings of Fact and Conclusions of Law ¶ 205 at p. 53. Plaintiffs in the present action were among the cement suppliers who declined to renegotiate their contracts.

Opinion of United States District Court in Nikkei and East Europe Actions

Individual Contracts

Plaintiff Decor by Nikkei International, Inc. ("Nikkei") is a New York corporation. On April 21, 1975, it entered into a contract with the Federal Military Government of the Federal Republic of Nigeria ("Nigeria") under which it agreed to supply Nigeria with 240,000 metric tons of cement (B.S.S. 12/1958), plus or minus 10% at Nikkei's option. The purchase price was $60 per metric ton, C.I.F. Lagos/Apapa, for a total price of $14.4 million, plus or minus 10%. The cement was to be delivered in 6-ply Kraft paper bags (50 kgs G/N).

Upon the filing of a performance bond by Nikkei in the amount of $18,000 (one twenty-fourth of 3% of the total purchase price), which apparently had already been secured before the execution of the contract, Nigeria was in turn required to establish an irrevocable, transferable, divisible and confirmed letter of credit in favor of Nikkei for the total purchase price. The letter of credit was to be established through First National City Bank in New York City and was to be payable on sight upon presentation of invoices, clean on board bills of lading, and insurance certificates.

Pursuant to the contract, Nikkei was to commence shipment of cement to Nigeria within 45 days of its receipt of the letter of credit in New York. Delivery was to be made at the rate of 20,000 metric tons per month, plus or minus 10% or plus such additional quantity as Nikkei elected to deliver. All shipments were to be insured by Nikkei out of Barcelona, Spain or Piraeus, Greece. Therefore, all

shipments had to originate from those ports to be in conformance with the contract.[1]

The contract also provided that Nikkei would receive demurrage payments in an amount "not exceeding" $4,100 per diem, in the event that the cement could not be unloaded in Nigeria within a specified period of time provided that Nigeria was given due notice by cable of the departure from the port of loading of each consignment. Such demurrage was to be payable under the terms of the letter of credit, in addition to the full purchase price, upon presentation of time sheets and statements of facts duly certified as correct by the ship's master and by the ship's agent in Lagos, Nigeria.

The terms of the contract were to be governed by the laws of the United States, and all disputes arising thereunder were to be submitted to arbitration by the International Chamber of Commerce, Paris, France.[2]

On January 28, 1975, plaintiff East Europe Import-Export, Inc. ("East Europe"), a New York corporation, entered into a cement contract with Nigeria. The terms of this contract were identical to those of the contract entered into by Nigeria and Nikkei except for the following: First, East Europe contracted to provide a fixed amount of bagged cement to Nigeria, 240,000 metric tons, without a 10% option. Second, the price of cement was to be $59.50 per metric ton, and East Europe was to provide Nigeria with a performance bond in the amount of 3% of the pur-

1. Nikkei requested that it be permitted to ship cement out of other ports as well, but that request was never approved by Nigeria.

2. No arbitration of the claims in these actions has been attempted, and defendants have waived any right to such arbitration.

chase price—$428,400. Third, Nigeria was to establish a letter of credit in favor of East Europe with First National City Bank in New York City. If East Europe determined that the letter of credit was not acceptable, it was to request appropriate amendments. If Nigeria refused to amend the letter of credit, the performance bond was to be returned to East Europe, and the contract was to be cancelled. Fourth, East Europe was to commence shipment of cement to Nigeria in amounts not less than 20,000 metric tons per month within six weeks of its receipt of Nigeria's letter of credit in New York. Fifth, the contract provided that East Europe was to insure each shipment from Constanza, Rumania, thereby requiring that all shipments originate from that port. Nigeria, upon request from East Europe, later amended the letter of credit to provide that shipments could be made from any port.

Plaintiff Chenax Majesty, Inc. ("Chenax"), a New York corporation, entered into a contract to supply Nigeria with cement on March 20, 1975. Its contract is similar to the contract entered into by Nikkei and Nigeria. The principal differences are that the Chenax contract required that Chenax provide Nigeria with cement conforming to Spanish specification P. 350; that Chenax was to provide Nigeria with a revolving performance bond in the amount of $36,000 (one-twelfth of 3% of the total purchase price of $14.4 million); that Nigeria's letter of credit was to be established in Chenax's favor with Schroeder, Muenchmeyer, Hengst & Co. in Hamburg, West Germany; that demurrage be accumulated at the unqualified rate of $4,100 per diem; and that the law of Switzerland was to govern

the terms of the contract. Chenax's contract originally required that all shipments of cement be insured by Chenax from Barcelona and/or Tarragona, Spain to Lagos/Apapa Quay. Therefore, all shipments of cement were to originate from those ports. However, Nigeria later accepted Chenax's request that it be permitted to ship cement from other ports. It was agreed that shipment could be from any European or American port, and the terms of the letter of credit were amended accordingly.

Letters of Credit

Contrary to the terms of these contracts, no letters of credit were ever established by Nigeria at any of the banks listed in the three cement contracts. Instead, Nigeria unilaterally established individual letters of credit in favor of each of the plaintiffs with defendant CBN and advised plaintiffs thereof through Morgan Guaranty Trust Company of New York ("Morgan"). These letters of credit could only be drawn upon at Morgan. Nikkei's letter of credit was issued by CBN on July 14, 1975, and Nikkei was advised of this through Morgan and First National City Bank in New York. East Europe's letter of credit was issued on August 4, 1975, and Morgan advised East Europe of that by letter dated August 13, 1975. Chenax's letter of credit was issued on April 25, 1975, and Chenax was notified by Morgan by letter dated May 8, 1975.

These letters of credit further deviated from the terms of the cement contracts since none of the letters of credit were confirmed by Morgan or any of the banks specified in

the contracts. In spite of this nonconformity, each plaintiff accepted its respective letters of credit. CBN had indicated to Chenax and East Europe that it was "irrevocably" committed to honoring its engagements under the letters of credit. See letter dated July 14, 1975 from Bills Manager of CBN to East Europe and letter dated May 27, 1975 from CBN's Bills Manager to Chenax. Based on these representations, Chenax and East Europe accepted CBN's irrevocable letters of credit without confirmation.

Under these letters of credit, each plaintiff was to receive both the contract price of the cement and any demurrage for which Nigeria became liable under the contract. As indicated above, Nikkei and East Europe were entitled to receive demurrage in an amount *not exceeding* $4,100 per diem, while Chenax's contract provided that it would receive demurrage at the flat rate of $4,100 per diem. It appears the qualifying words "not exceeding" had been originally included in Chenax's contract but were intentionally stricken therefrom with the consent of Nigeria and Chenax.

Finally, the Court notes that each of the three letters of credit specifically stated that it would be subject to the Uniform Customs and Practice Documentary Credits (1962 Revision) as set forth in Brochure No. 222 issued by the International Chamber of Commerce.

Nikkei's Performance Under the Contract

On July 29, 1975, Nikkei received notice that Nigeria had established a letter of credit in Nikkei's favor at Morgan in New York. Thereafter, on August 22, 1975, Nikkei

authorized the transfer of part of its letter of credit, in the amount of $1,032,000, through Morgan to Transfina, N.V. of Curacao, Netherlands Antilles, from whom Nikkei had expected to purchase 20,000 metric tons of cement at a price of $51.60 per metric ton. The expiration date of the transfer was January 15, 1976. Transfina allegedly had sources of cement in the Caribbean. However, Nikkei's contract with Nigeria required that cement be shipped from and insured from either Barcelona, Spain or Piraeus, Greece. Since the contract was not modified to permit shipments out of the Caribbean,[3] Nikkei could not fulfill its contractual obligations through its subcontract with Transfina. On January 15, 1976, Nikkei's transfer of part of the letter of credit to Transfina lapsed pursuant to the terms of said transfer, and Nikkei reacquired its full interest in the letter of credit.

Thereafter, in August, 1975, Nikkei informally entered into an agreement with Productos Fontanet, S.A. of Palma de Malorca, Spain, under which Productos Fontanet was to provide Nikkei with cement for shipment to Nigeria. On August 28, 1975, Nikkei requested that Morgan transfer a portion of its letter of credit in the amount of $1.2 million to Productos Fontanet. Its written instructions to Morgan regarding this transfer directed that the partial transfer was to be made upon the same terms and conditions as the original letter of credit established by Nigeria. The transfer was the means by which Productos Fontanet was to be paid for providing 20,000 metric tons of cement to Nigeria on behalf of Nikkei at the rate of $51 per metric ton. It

3. See Footnote 1 and accompanying text.

appears that Productos Fontanet owned an interest in a cement factory. Also, Productos Fontanet had a wholly owned subsidiary which was a shipping company and which would provide the means of transporting the cement to Nigeria. Under this arrangement, Nikkei would have fulfilled its contractual obligations to Nigeria with respect to the first 20,000 metric tons of cement.

On or about August 29, 1975, Nikkei received a cable from Nigeria indicating that the Nigerian government had suspended the importation of cement for three months as of August 18, 1975 because of congestion at Lagos and other ports. Nikkei was directed to defer all further chartering and loading of ships. A "new agreement" was to be negotiated for the rescheduling of delivery of the balance of the cement.

Nikkei then cabled Productos Fontanet informing them of the cable from Nigeria and requesting that shipments be deferred for three months. Nikkei received a telegram on September 3, 1975 from Productos Fontanet indicating that a penalty would be assessed against Nikkei if shipments were delayed.

Thereafter, on September 11, 1975, Nikkei and Productos Fontanet entered into a written contract whereby Productos Fontanet agreed to provide Nikkei with 120,000 metric tons of BSS 12/1958 cement, plus or minus 10% at the option of Productos Fontanet. The contract further provided that Nikkei would have an option to purchase an additional 120,000 metric tons. It was agreed that the price of the cement would be $54 per metric ton for the first 8,500 metric tons and $52 for the balance. Shipment was to be

made "C.I.F.F.P.A. from any Mediterranean and/or European port(s) to Lagos, Apapa." Payment was to be made by transfer of the irrevocable letter of credit issued by CBN through Morgan. Also, Productos Fontanet was to receive demurrage not exceeding $4,100 per diem from Nikkei.

On September 12, 1975, bills of lading and other documents were issued by Productos Fontanet for a shipment of 8,500 tons of cement from Barcelona, Spain to Lagos/Apapa. These documents were presented to Morgan in New York on September 29, 1975, and Morgan paid $510,000 to Nikkei and Productos Fontanet. However, no ships ever sailed for Nigeria because clearances for shipment were never issued by Nigeria.

The day following this payment to Nikkei and Productos Fontanet or soon thereafter, Morgan in New York notified Nikkei by letter that the irrevocable letter of credit issued by Nigeria had been amended to provide that "[a]ll commercial invoices presented must be certified invoices and must be certified by the beneficiaries or their agents." CBN had also informed Morgan that it should not make payments for demurrage under any letter of credit which had been issued regarding any cement contract unless the documents submitted to Morgan were certified by CBN. CBN also required that Morgan not "pay against documents presented in respect of letters of credit . . . unless such documents are accompanied by certificates confirming that clearance [for shipping] has been obtained for the ships to sail to Nigeria." See letters dated September 30, 1975 from

Morgan to Nikkei.[4] Nikkei had not agreed to the addition of these conditions for payment under the letter of credit.

On or about October 8, 1975, Nikkei's president and principal shareholder, Tetsuo Ozawa, traveled from New York City to Lagos, Nigeria to meet with the Cement Negotiating Committee of the Nigerian government at the Committee's request. The meeting took place at CBN's offices. The purpose of this visit was to discuss the rescheduling of cement deliveries. At that meeting, Ozawa, as Nikkei's representative, was asked to cancel the cement contract and letter of credit without compensation. Ozawa declined. Ozawa again traveled to Nigeria in February, 1976 to meet with various government officials. He was again asked to discharge the contract and the letter of credit, and again he declined.

The evidence submitted at trial indicates that Nigeria did not intend to provide Nikkei or any of the other plaintiffs herein with the certificates they would need to obtain payment due from Morgan under the letters of credit as amended unless they agreed to cancel their cement contracts.

East Europe's Performance Under its Contract

Pursuant to the terms of its contract, East Europe was required to post a performance bond in the amount of $428,400. The contract expressly states that such a performance bond was "already deposited by [East Europe] with the Central Bank of Nigeria" as of the date of the execution of the contract—January 28, 1975. It appears,

4. Plaintiffs East Europe and Chenax also received notification from Morgan of the amendments to their letters of credit by CBN and of the suspension of importation of cement into Nigeria.

however, that no performance bond had yet been established as of that date. Indeed, East Europe did not provide Nigeria with a performance bond of any amount until July 25, 1975 when a bond was issued through First National City Bank in the amount of only $248,400. CBN issued a letter of credit in favor of East Europe on August 13, 1975, although a performance bond in the amount of $428,400 was never established by East Europe.[5]

However, the letter of credit established by Nigeria in favor of East Europe did not contain a requisite appendix which set forth the acceptable ports from which shipment of cement might originate, the demurrage rate, and other contract terms. Therefore, it was not acceptable to East Europe. On August 18, 1975, East Europe requested that amendments be made to the letter of credit which set forth these contract terms. By letter dated September 8, 1975, Morgan in New York informed East Europe that these amendments had been made.

Because of these delays by East Europe in obtaining a performance bond and by CBN in issuing an amended letter of credit, a prior subcontract which East Europe had entered into with a Romanian cement supplier—Vitrocim—lapsed. East Europe had entered into this contract with Vitrocim on December 13, 1974 in anticipation of the Nigerian cement contract. Having lost its subcontractor, East Europe sought to find an alternate source of cement.

---

5. Evidence of a second performance bond in the amount of $180,000 issued by Chase Manhattan Bank, Piraeus, Greece, on behalf of East Europe was submitted to the Court.

On September 24, 1975, East Europe entered into a subcontract with International Trade & Finance Espanola S.A. ("Intrafinsa") under which Intrafinsa would supply and deliver to Nigeria 120,000 metric tons of cement at a price of $51.25 per metric ton, CIF Lagos/Apapa. Payment of this subcontract was to be effected by a transfer of a portion of CBN's letter of credit in favor of East Europe to Intrafinsa. Also, Intrafinsa was to receive demurrage in an amount not exceeding $4,100 per diem.

By letter dated October 3, 1975, Morgan informed Intrafinsa that a transfer of a portion of CBN's letter of credit had been made. However, prior to that date, the Nigerian government had informed East Europe of the suspension of the importation of cement into Lagos and other Nigerian ports. Also, CBN further amended its letter of credit to require certification of all documents "by the beneficiaries or their agents" prior to presentment and payment under the letter of credit.[6] Morgan's letter to Intrafinsa regarding the partial transfer specifically noted these limitations.

Notwithstanding this amendment to the letter of credit by CBN and the suspension of importation of cement, East Europe apparently elected to perform its obligations under the cement contract rather than suspend its performance since it had not agreed to the amendment to the letter of credit and had not agreed to any modification of its contract.

On or about October 14, 1975, Morgan was presented with documents which complied with the conditions set forth with the original letter of credit issued by CBN, but which

6. See Footnote 4 and accompanying text.

did not bear certifications by the Nigerian Authorities. The documents indicated that 10,500 metric tons of cement had been loaded on the vessel M/V Torenia at Bilboa, Spain, and was destined for Lagos/Apapa. Upon inquiry by Morgan, CBN instructed Morgan not to make payment regarding this shipment under the letter of credit.

East Europe had also entered into another cement subcontract, for the purpose of fulfilling its obligation under the Nigerian cement contract, with Bergbau-Handel G.m.b.H. of Berlin, East Germany. That subcontract, dated April 11, 1975, provided that Bergbau-Handel would provide East Europe with 30,000 metric tons of cement, F.O.B. at the price of $27 per metric ton. Apparently, East Europe was required, under that subcontract, to obtain means of transporting the cement to Lagos/Apapa from Rostock, Germany. Payment under this subcontract was to be effected by a transfer of part of the CBN letter of credit. Pursuant to instructions from East Europe, Morgan notified Bergbau-Handel of the partial transfer. However, Bergbau-Handel rejected the transfer because the letter of credit did not comply with the terms of the subcontract.

On or about October 13, 1975, East Europe's principal officer, Irving Ross, traveled to Nigeria on behalf of East Europe pursuant to an invitation from the Nigerian authorities to discuss the problem of congestion in the ports of Nigeria and the suspension of importation of cement. Because there were a number of other cement contractors visiting Nigeria at that time, Ross became aware that Nigeria had contracted to purchase a substantial quantity of cement. He met with the Nigerian cement contract nego-

tiating committee, as had Ozawa on behalf of Nikkei, and was told that Nigeria no longer needed or wanted cement. He was asked to cancel the cement contract, but he did not agree to the proposed cancellation. He later asked for clearances for shipment of cement pursuant to East Europe's cement contract. These requests were never granted.

Chenax's Performance Under Its Contract

Prior to entering into its contract with Nigeria, Chenax had entered into an *oral* agreement with Transcommerce Warenhandels Gmbh & Co. KG of Hamburg, Germany ("Transcommerce") whereby Transcommerce and Chenax agreed to "cooperate" in the fulfillment of Chenax's cement contract. Pursuant to that agreement and in anticipation of the execution of the Nigerian cement contract, a revolving performance bond in the amount of $36,000 was issued by Schroeder, Muenchmeyer, Hengst & Co. on behalf of Chenax and Transcommerce. Notice of the issuance of the bond was sent to CBN by letter dated March 14, 1975 by Schroeder, Muenchmeyer & Hengst Co. Nigeria subsequently established a letter of credit in favor of Chenax on April 25, 1975 with CBN.

On May 13, 1975, Chenax requested that Morgan transfer the entire letter of credit to Transcommerce, and Morgan complied with that request. However, on or about August 14, 1975, Schroeder, Muenchmeyer, Hengst & Co. notified Morgan that Transcommerce had rejected the transfer. Apparently, Transcommerce had determined that it would not participate in the performance of the cement

contract. Chenax's principal officer, director and major shareholder, Dr. Uche Akuba, testified at trial that Chenax and Transcommerce had originally intended to obtain cement from Cementos Especiales, a cement factory in Las Palmas, Canary Islands. When Transcommerce decided to withdraw from this matter, Chenax obtained the services of an agent, Souhail Makareem. Makareem, according to Dr. Akuba's testimony at trial, obtained a separate oral arrangement with Cementos Especiales to supply Chenax with 40,000 metric tons of cement at $34.80 per ton, F.O.B. Las Palmas, with an option by Chenax to purchase the balance of its needs from Cementos Especiales at that price. The cost of insurance was to be $.35 per metric ton. For his services as Chenax's agent, Makareem was to receive $.65 per metric ton for each metric ton of cement purchased by Chenax from Cementos Especiales.

Chenax's shipping agent, M. G. Pamies, procured a contract of affreightment with the shipping firm of Pearl Marin Shipping, Stockholm, Sweden, to carry 240,000 metric tons of cement in bags, plus or minus 10%, from Las Palmas to Nigeria at the rate of $16.60 F.I.O.S. Demurrage would be paid to Pearl Marin Shipping at the rate of $.40 per metric ton per day or pro rata for any part of a day. Pearl Marin was to pay brokerage fees of 4.5% of the freight and demurrage under that contract. Of this amount, M. G. Pamies was to receive 2.5%. It is unclear from the contract as to who was to receive the remaining 2%. Dr. Akuba testified at trial that he understood that Chenax would receive the remaining 2%. The Court finds that the evidence submitted

does not support the conclusion that Chenax was entitled to the remaining 2% in brokerage fees.

Dr. Akuba also testified that either in early July, 1975 or in early August, 1975, he met with agents for an unspecified Italian cement company and had received an oral commitment from it to provide Chenax with cement at the rate of $32 per metric ton, F.O.B. Italian ports. The Court notes that this oral commitment was made either before or at about the time that Chenax entered into an oral agreement with Cementos Especiales to purchase 40,000 metric tons of cement at the price of $35 per metric ton.

On or about August 28, 1975, Chenax received a cable from the Nigerian government informing Chenax that the importation of cement was suspended for at least three months. Chenax thereafter expressly accepted the suspension. Morgan subsequently informed Chenax that CBN had amended its letter of credit; the proposed amendment was similar to those attempted to be made by CBN with respect to the letters of credit issued in favor of Nikkei and East Europe; it was also undertaken unilaterally.[7] Chenax did not consent to these amendments.

During October, 1975, Dr. Akuba visited Nigeria pursuant to an invitation to meet with representatives of Nigeria's Ministry of Defense and CBN. He was asked to cancel the Nigerian cement contract and CBN's letter of credit, but he refused to do so.

---

7. See Footnote 4 and accompanying text.

Discussion—Jurisdiction

Before addressing the merits of plaintiffs' claims, the Court will first resolve defendants' contention that they are both immune from the jurisdiction of this Court pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, under the circumstances set forth above. This defense of sovereign immunity was originally raised by defendants in their answer to the complaints, but it was stricken therefrom by Order of this Court dated June 16, 1979. Magistrate Schreiber, to whom motions regarding this issue had been referred to hear and recommend, previously reported that, in his view, this Court had jurisdiction over defendants pursuant to section 1605(a)(2) of the Act. See Magistrate Schreiber's Amended Recommendation dated September 19, 1978. This Court adopted that recommendation. By arguments raised in their post-trial submissions, defendants seek to renew their contention that this Court lacks in personam jurisdiction over them under the Act.

The Foreign Sovereign Immunities Act of 1976

In adopting the Foreign Sovereign Immunities Act, Congress sought to accomplish four objectives: (1) to codify the "restrictive principle" of sovereign immunities, as it has been generally recognized in international law, under which a foreign state is immune from suits in the courts of another country which are founded upon its "public acts" (jure imperii), while acknowledging the jurisdiction of said courts regarding actions based on the commercial or "pri-

vate acts" (jure gestionis) of the foreign state; (2) to insure that this restrictive principle is applied in actions in the courts of the United States, thereby dispensing with the authority of the Department of State to make final determinations regarding foreign immunity; (3) to provide a statutory procedure for service of process and obtaining in personam jurisdiction over a foreign state; and (4) to provide a means by which a judgment creditor may secure a remedy if a foreign state fails to satisfy a final judgment. H.R.Rep.No.94-1487, 94th Cong., 2d Sess. 7-8, reprinted in [1976] U.S.Code Cong & Ad.News, pp. 6605-606 (hereinafter cited as "House Report"). A principal purpose of the Act was to provide a remedy for American citizens, businessmen, and property owners who increasingly come into contact with foreign states and commercial entities owned by foreign states. *Verlinden B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284 at 1291 (S.D.N.Y., 1980).

Section 1604 of the Act expressly sets forth the grant of immunity afforded foreign sovereigns. It provides that except for the limitations enumerated in sections 1605 and 1607 thereof and subject to existing international agreements entered into by the United States at the time the Act became effective, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . ." 28 U.S.C. § 1604. The grant of immunity therefore is limited, and the Court must look to other provisions of the Act, particularly section 1605, to determine the bounds of the grant of immunity.

Opinion of United States District Court in Nikkei and East Europe Actions

The subject matter and personal jurisdiction of this Court in civil actions involving foreign states is defined in section 1330 of Title 28, United States Code. It states:

> ' (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) [of the Foreign Sovereign Immunities Act] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of [the Act] or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of [the Act.]"

This Court accordingly has subject matter jurisdiction pursuant to section 1330(a) over civil actions in which the defendant foreign state is not entitled to immunity under the Foreign Sovereign Immunities Act. Also, it has personal jurisdiction pursuant to section 1330(b) over a foreign state in actions in which the claim asserted by the plaintiff is "one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity." House Report at p. 6612. Therefore, the focal issue with respect to both the Court's subject matter and personal jurisdiction is whether the defendant foreign state is entitled to immunity under the alleged facts.

Section 1605(a) of the Foreign Sovereign Immunities Act sets forth several instances in which a foreign state

will not be immune from the jurisdiction of American courts. In particular, section 1605(a)(2) describes three instances in which immunity will not be afforded the foreign state. These are: (1) when the action is based upon a commercial activity carried on within the United States by the foreign state; (2) when the action is based upon an act performed in this country which relates to a commercial activity of the foreign state elsewhere; and (3) when the action is based upon an "act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The first two exceptions to the grant of immunity under this provision involve activities of the foreign state within the United States. The third exception involves the foreign activities of the foreign sovereign which cause some direct injury or result in the United States.

The "direct effect" requirement of the third exception under section 1605(a)(2) is apparently intended, in part, to ensure that there is "some connection between the lawsuit and the United States" thereby assuring that the exercise of the court's personal jurisdiction over the foreign state under section 1330(b) comports with the minimum contacts standard set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). House Report at p. 6612. Therefore, the "direct effect" exception under section 1605(a)(2) requires not only that there be an immediate causal effect within the United States, *Carey* v.

National Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979), but also that there be sufficient minimum contacts between the matter in controversy and the United States to support the court's exercise of in personam jurisdiction.

The Court also notes that the third exception under section 1605(a)(2) was also intended to subject a foreign state to the jurisdiction of the courts of the United States with respect to the foreign state's commercial conduct elsewhere in a manner "consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." House Report at p. 6618. Section 18 of the Restatement states:

> "A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effects are constituent elements of activity to which the rule applies; (ii) *the effect within the territory is substantial;* (iii) *it occurs as a direct and foreseeable result of the conduct outside the territory;* and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems." (emphasis added).

Section 18(b) of the Restatement is similar in substance to the "direct effect" clause of section 1605(a)(2) of the

Foreign Sovereign Immunities Act. Both section 18(b) of the Restatement and section 1605(a)(2) of the Foreign Sovereign Immunities Act provide for in personam jurisdiction over a defendant who has caused a direct effect within the forum state. Comment "f" following section 18 of the Restatement indicates that under subsection (b), "the effect within the territory must be *substantial* and occur as a direct and *foreseeable* result of the conduct outside the territory." Restatement (Second) Foreign Relations Law of the United States § 18 at p. 50 (1965). (emphasis added). Therefore, it appear that under the "direct effect" exception of section 1605(a)(2) of the Foreign Sovereign Immunities Act the determinative issues are whether the injury allegedly suffered by the plaintiff was a substantial, foreseeable, and immediate causal result of an act of the defendant, outside the United States in connection with defendant's commercial activity elsewhere and whether the minimum contacts standard set forth in *International Shoe Co.* and *McGee* has been satisfied.

In the present actions, it is undisputed that each defendant would be immune from the personal jurisdiction of this Court pursuant to section 1604 of the Foreign Sovereign Immunities Act if none of the exceptions set forth in section 1605 applied. Defendant Nigeria is a foreign state, and defendant CBN, as an agency or instrumentality of defendant Nigeria, is also entitled to immunity. 28 U.S.C. §§ 1603(b), 1604. The questions presented to this Court by defendants' renewal of their contention that this Court lacks personal jurisdiction under sections 1330(b) and 1605(a)(2) of the Act are: (1) whether each defendant has

committed an act outside the territory of the United States in connection with commercial activity elsewhere; (2) whether that act caused a substantial, foreseeable, and immediate effect in the United States and (3) whether the minimum contacts standard has been satisfied with respect to each defendant.

The acts of defendant Nigeria which plaintiffs allege constitute anticipatory breaches of their individual contracts took place outside the United States and relate to Nigeria's commercial transactions with plaintiffs. The suspension of the importation of cement and the refusal to issue documents to plaintiffs allowing them to commence shipment of cement into Nigeria took place in that country. Similarly, the conduct of defendant CBN which is in dispute relates to its commercial banking activities in Nigeria. The unilateral amendments of the three letters of credit occurred in Nigeria. *See Verlinden B.V. v. Central Bank of Nigeria, supra,* at 1298 ("the 'repudiation' was issued in Nigeria (an act outside the United States)"). Therefore, the requirement under the "direct effect" exception under section 1605(a)(2) that each defendant commit an act outside the United States in connection with their commercial activities elsewhere is satisfied. The remaining issues to be resolved are whether those acts had a substantial, foreseeable, and immediate casual effect with the United States and whether the minimum contact test has been satisfied.

Judicial Interpretations of the Act

The courts which have been presented with the issue of whether the "direct effect" exception renders a particular

foreign state amenable to the jurisdiction of American courts have followed divergent modes of analysis. Some courts have held that the "locus of the injury is *dispositive* of jurisdiction" (emphasis supplied), implying thereby that both the minimum contacts standard and the requirement of a substantial, foreseeable, and immediate causal effect are satisfied when the locus of the injury is in the United States. *Verlinden B.V. v. Central Bank of Nigeria, supra,* at 1298 and cases cited therein. Other decisions have held that the "direct effect" exception is fulfilled "only where there are significant contacts between the transaction underlying the cause of action and the United States." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* —— F.Supp. —— at ——, 78 Civ. 2395, slip op. at 12 (S.D.N.Y. July 16, 1980); *East Europe Domestic International Sales Corp. v. Terra,* 467 F.Supp. 383, 388 (S.D. N.Y. 1979). Each of these approaches addresses only one of the issues which must be resolved here. The locus-of-injury approach is primarily concerned with whether the alleged injury was a substantial, foreseeable, and immediate causal result of the act of the defendant foreign state. On the other hand, an analysis of the contacts between the underlying transaction and the forum country only addresses the issue of whether the minimum contacts standard has been satisfied.

While the determination of the locus of the alleged injury may indeed determine whether there has been a substantial, foreseeable, and immediate causal effect within the United States, it does not necessarily determine whether the minimum contacts standard has been met. A sep-

arate determination of this second issue must be made. *Cf. Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979).

In determining whether sufficient minimum contacts are present between the defendant foreign state and the United States, the court must consider not merely whether there are sufficient contacts with respect to the contract in dispute, but more broadly whether maintenance of the suit offends "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1940). The contacts between the defendant and the forum must be such that it is reasonable to require the defendant to litigate the dispute in that forum. Id. at 317, 66 S.Ct. at 158. The factors to be considered by the court are: (1) the burden placed on the defendant in litigating in that forum; (2) the interest of the forum in adjudicating the dispute, and (3) the plaintiff's interest in obtaining convenient and effective relief. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

In the present actions, the findings of fact of this Court as set forth herein support the conclusion that this Court has personal jurisdiction over each of the defendants under section 1330(b) and the "direct effect" exception of section 1605(a)(2) of the Foreign Sovereign Immunities Act. The alleged breaches of each of the three cement contracts and three letters of credit by the defendants caused substantial, foreseeable, and immediate injury to plaintiffs in New York. Each plaintiff is a New York corporation and payment was to be made to each plaintiff in New York through Morgan Guaranty Trust Company under the letters of

credit. Similarly, the three cement contracts were effectively amended to provide for payment thereunder in New York by Nigeria's unilateral establishment of the letters of credit with CBN, all of which were payable in New York. Under these circumstances, the locus of injury was in New York. *Cf. Verlinden B.V. v. Central Bank of Nigeria, supra,* at 1298; *National American Corp. v. Federal Republic of Nigeria,* 448 F.Supp. 622, 639 (S.D.N.Y.1978), *aff'd,* 597 F.2d 314 (2d Cir. 1979). The necessary minimum contacts are also present. Again, payment under each of these contracts and under each letter of credit was to be made in New York. Although the cement which was to be delivered to Nigeria under the cement contracts did not originate in or pass through the United States, payment therefor was to occur in New York at the instance of defendant Nigeria. Since defendants chose New York as the place of payment, the burden of litigating in this forum should not be overly burdensome. Moreover, Congress has indicated that in enacting the Foreign Sovereign Immunities Act it intended to ensure that "our citizens will have access to the courts in order to resolve ordinary legal disputes." House Report at p. 6605. Finally, it is clear that the plaintiffs have a substantial interest in a convenient and effective resolution of their individual claims which they may not, under the circumstances, otherwise obtain elsewhere. In this Court's view, under the guidelines set forth in *World-Wide Volkswagen Corp. v. Woodson, supra,* there are sufficient minimum contacts to warrant the exercise of this Court's in personam jurisdiction over each of the defendants.

Contra, Texas Trading & Milling Corp. v. Federal Republic of Nigeria, supra.

Having determined that this Court has in personam jurisdiction over the defendants, the Court will now address the merits of plaintiffs' claims.

Merits of Plaintiffs' Claims

The parties agree that the law of New York governs the claims asserted by Nikkei and East Europe for breach of contract and that the law of Switzerland is determinative of Chenax's claim for breach of contract. It is further agreed that with respect to the claims of all the plaintiffs for breach and repudiation of the individual letters of credit issued by CBN in favor of the plaintiffs, the Uniform Customs and Practice Documentary Credits (1962 Revision) governs. To the extent that the UCP does not indicate what relief may be obtained by a beneficiary of a letter of credit under the circumstances presented in this action, the parties agree that the law of New York governs the claims asserted by Nikkei and East Europe. Chenax contends that its claim under the letter of credit issued in its favor is also governed by New York law in this regard, but defendants contend that the law of Switzerland is determinative.

Letters of Credit

By the express terms of the individual letters of credit issued by CBN in favor of each of the plaintiffs, these letters of credit were irrevocable. Under Article 3 of the

Uniform Customs and Practice for Documentary Credits, an irrevocable credit "can neither be modified nor cancelled without the agreement of all concerned." The UCP is silent, however, as to the remedies available to a beneficiary of a letter of credit where there has been a unilateral amendment of an irrevocable letter of credit by the issuer. Accordingly, this Court must review New York law to determine whether Nikkei and East Europe may recover damages for their claims regarding their individual letters of credit under New York law.

Under present New York law, a beneficiary of an irrevocable letter of credit may usually obtain relief for anticipatory repudiation of the credit pursuant to Article 5 of the New York Commercial Code. N.Y.U.C.C. § 5-115 (McKinney 1964). However, section 5-102(4) of the New York Uniform Commercial Code provides:

> "Unless otherwise agreed, this Article 5 does not apply to a letter of credit . . . if by its terms or by agreement, course of dealings or usage of trade such letter of credit . . . is subject in whole or in part to the *Uniform Customs and Practice for Commercial Documentary Credits*. . . ." N.Y.U.C.C. § 5-102(4) (McKinney 1964).

The Court notes that this provision of the New York U.C.C. is not contained in the model Uniform Commercial Code as adopted by the American Law Institute and by the National Conference of Commissioners on Uniform State Law. Its enactment reflects the intent of the New York legislature to maintain the pre-Code conduct of international transactions in the State of New York to preserve the effect of

the Uniform Customs and Practice for Commercial Documentary Credits. N.Y. Commission Comment on section 5-102 at p. 650 (McKinney 1964); T. Quinn, *Uniform Commercial Code Commentary and Law Digest* ¶ 5-101 [A][4] at pp. 5-6 to 5-8 (1978).

Therefore, since the letters of credit issued by CBN in favor of Nikkei and East Europe expressly state that the UCP was to govern the terms thereof, Article 5 of the New York U.C.C. and the remedies contained therein do not apply to these actions. *Marine Midland Grace Trust Company of New York v. Banco Del Pais,* 261 F.Supp. 884, 886 n.1 (S.D.N.Y. 1966). Nevertheless, plaintiffs are not without a remedy under New York law. A letter of credit is a contract between the beneficiary of the credit and the issuing bank wholly separate from the underlying sales contract. *Shanghai Commercial Bank, Ltd. v. Bank of Boston Int'l,* 53 App.Div.2d 830, 385 N.Y.S.2d 548 (1st Dep't 1976). It appears that these plaintiffs may seek relief for the anticipatory repudiation of the credits under applicable pre-Code state law. *Cf. United Bank Ltd. v. Cambridge Sporting Goods Corp.,* 41 N.Y.2d 254, 392 N.Y.S.2d 265 n.2, 360 N.E.2d 943 (1976). As indicated in the discussion that follows, under pre-Code law, a complainant who asserts a claim for anticipatory repudiation of a contract must demonstrate that he would have been ready, willing, and able to fulfill his obligations under the contract. *Scholle v. Cuban-Venezuelan Oil Voting Trust,* 285 F.2d 318 (2d Cir. 1960). Therefore, Nikkei and East Europe each have the burden of demonstrating that it would have been ready, willing, and able to tender the requisite documents to CBN.

In effect, this requires that they each demonstrate that they would have been ready, willing, and able to perform the underlying cement contracts. This is the same burden plaintiffs bear with respect to their claims of anticipatory breach of the cement contracts, as discussed below. If plaintiffs prevail on their claims of anticipatory breach of the cement contracts, they shall also prevail on their claims of anticipatory repudiations of the letters of credit.

Chenax's letter of credit is silent as to what law governs its terms. It appears, however, that since Swiss law governs the terms of the underlying cement contract, it should also govern the terms of the letter of credit. Assuming arguendo that Chenax's letter of credit is governed by Swiss law rather than by New York law, the parties have nevertheless failed to definitively establish the applicable Swiss law. Therefore, this Court must assume that Swiss law regarding anticipatory repudiation of irrevocable letters of credit is the same as that of New York. *Ogden Development Corp. v. Federal Insurance Co.*, 508 F.2d 583 (2d Cir. 1974). Accordingly, Chenax must demonstrate that it would have been ready, willing, and able to perform its obligations under the letters of credit and produce the documents required for payment thereunder to prevail on its claim against CBN. Its ability to perform the underlying cement contract will be determinative of the issue.

Anticipatory Breach of Contract—New York Law

Under section 2-610 of the New York Uniform Commercial Code, N.Y.U.C.C. §2-610 (McKinney 1964), when a buyer repudiates a contract with his seller with respect to a

performance not yet due, the aggrieved seller may, *inter alia*, "resort to any remedy for breach provided in the Code." Defendants do not dispute that the suspension of the importation of cement and the failure to issue certificates to plaintiffs which authorized the commencement of shipping of cement into Nigeria pursuant to these contracts are sufficient to constitute anticipatory breaches of the three contracts under section 2-610. Indeed, these acts clearly demonstrate Nigeria's intent to terminate its performance under these contracts. Defendants contend, however, that plaintiffs must not only demonstrate that there was an anticipatory breach, but also that they were each ready, willing, and able to fulfill their individual obligations under the contracts.

Under New York law prior to the enactment of the U.C.C., a seller whose contract was anticipatorily breached was required to demonstrate that he would have been ready, willing, and able to complete performance under the contract. *Scholle v. Cuban-Venezuelan Oil Voting Trust, supra.* Although the express provisions of the Code, as adopted by New York, are ambiguous as to whether this requirement has been retained, the New York courts appear to have continued to require proof of readiness, willingness, and ability to perform. *E.g., UFITEC, S.A.* v. *Trade Bank & Trust Co.*, 21 App.Div.2d 187, 249 N.Y.S.2d 557 (1st Dep't 1964), *aff'd*, 16 N.Y.2d 698, 261 N.Y.S.2d 893, 209 N.E.2d 551 (1965); *see also, Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 408 N.Y.S.2d 36, 379 N.E.2d 1166 (1978). Accordingly, this Court finds that plaintiffs Nikkei and East Europe individually have the burden of proving that they

would have been ready, willing, and able to perform under the contracts in dispute.

The evidence submitted to the Court indicates that Nikkei had subcontracted with Productos Fontanet to obtain 120,000 metric tons of cement and that it had an option to purchase an additional 120,000 metric tons. Therefore, if Nikkei had exercised its option, it would have obtained its entire commitment under the cement contract with Nigeria from Productos Fontanet. As indicated by the bills of lading in evidence, it appears that Productos Fontanet was performing under its subcontract at the time importation of cement into Nigeria was suspended. N.Y.U.C.C. § 1-202 (McKinney 1964) (a bill of lading is prima facie evidence of the facts stated therein). Defendants have offered no credible evidence to the contrary.

Nikkei contends not only that it would have been able to fully perform under its cement contract through its subcontract with Productos Fontanet, but also that even if it had not exercised its option with Productos Fontanet, it would have been able to obtain an additional 144,000 metric tons of cement (the remaining 120,000 metric tons plus 10% of the 240,000 metric ton total under its contract with Nigeria) from other Spanish cement factories at a lower price than it was paying Productos Fontanet.

The evidence submitted at trial supports the conclusion that the cement factories in Spain and other European countries had sufficient un-utilized capacity in 1975 and 1976 to provide Nikkei, and the other plaintiffs, with sufficient cement to fulfill their contracts with Nigeria. In 1975, Spain produced more than 23.9 million metric tons of

cement and had a capacity to produce more than 26.9 million metric tons of cement. *Memoria del Cemento* at p. 4. In 1976, Spanish cement factories produced more than 25.3 million metric tons of cement and had a capacity to produce more than 32.8 million metric tons of cement. *World Cement Directory 1977* at p. 246. Therefore, it appears that Spanish cement factories had sufficient capacity to produce more than 10 million additional metric tons of cement than was in fact produced during the period 1975 through 1976. In the aggregate, Nigeria's contracts with plaintiffs required the delivery of only 720,000 metric tons of cement.[8]

Therefore, since the evidence indicates that Productos Fontanet was performing its subcontract with Nikkei and that other factories in Spain had sufficient un-utilized capacity to provide Nikkei with enough cement to enable Nikkei to fulfill its obligations under its contract, the Court finds that Nikkei was ready, willing, and able to complete performance and provide Nigeria with 240,000 metric tons of cement. There is insufficient evidence to support Nikkei's contentions that it could have obtained a lower sub-

8. Defendants argue that none of the plaintiffs would have been able to fulfill its obligations if the Nigerian government had not suspended importation of cement into Lagos and had not renegotiated many of the outstanding cement contracts because the total volume of cement that Nigeria had contracted to purchase exceeded the amount of cement available during the relevant time period. This argument is meritless. Nigeria did suspend the importation of cement into Lagos and did renegotiate at least 43 of the cement contracts. Regardless of what may have occurred if no embargo had been imposed, the issue before this Court is whether plaintiffs could have fulfilled their individual obligations under the circumstances that actually existed during the relevant time period.

contract price than the price it had negotiated with Productos Fontanet or that it would have exercised its option to provide Nigeria with an additional 24,000 metric tons of cement. Therefore, Nikkei may not recover lost profits for the additional 24,000 metric tons of cement for which it had an option to supply Nigeria.

The Court also finds that East Europe could have provided Nigeria with 120,000 metric tons of cement through its subcontract with Intrafinsa. Intrafinsa had provided Nigeria with at least 37,630 tons of cement pursuant to Intrafinsa's subcontract with another cement supplier who is not a party to this action. *National American Corporation v. Federal Republic of Nigeria, supra.* Since sufficient cement was available in Spain and elsewhere in Europe in 1975 and 1976, see *World Cement Directory 1977*, it is reasonable to conclude that Intrafinsa could have fulfilled its obligations to East Europe under the subcontract, and East Europe, in turn, could have also fulfilled its contractual obligations to Nigeria.[9] Based on the evidence submitted at trial, it is apparent to the Court that East Europe had in fact negotiated other purchases of cement during 1976 to fulfill its contractual obligations under other cement contracts with other parties. See Plaintiffs' Exhibits EE-25 and EE-26 regarding East Europe's purchase of 50,000 metric tons of cement from a Romanian source in April, 1976.

---

9. It appears from the evidence submitted at trial that sufficient shipping resources were available to transport the cement to Nigeria, particularly since Nigeria had cancelled several of its cement contracts thereby increasing the number of ships available.

Defendants have sought to demonstrate that Irving Ross, East Europe's principal officer, had a questionable financial background and that East Europe could not, therefore, have been able to secure subcontracts to fulfill its obligations. However, since Nigeria had established an irrevocable, transferrable letter of credit in East Europe's favor with CBN, and in view of the availability of cement, it is clear that East Europe could have secured subcontracts for cement by transferring part of its letter of credit to such subcontractor, regardless of Ross' financial reputation in the industry. This in fact was the means by which East Europe was to effect payment under its subcontract with Intrafinsa.

Anticipatory Breach of Contract—Swiss Law

Since the cement contract between Nigeria and Chenax expressly states that the law of Switzerland should govern the terms of the contract, it is clear that Chenax's claim for breach of contract must be resolved under the laws of that country. Actions for anticipatory breach of a contract brought in Switzerland are governed by the Swiss Code of Obligations. Article 107 of that Code provides:

> "If the obligor is in default in the case of a bilateral contract, the obligee shall be entitled to fix an appropriate time limit . . . for subsequent performance, or to have it fixed by the competent authority.
>
> "If, at the expiration of this time limit, there is no performance, the obligee may still sue for performance plus damages due to delay . . . . Alternatively, if he so declares without delay, *he may waive future per-*

> *formance and ask for compensation for damages arising out of the nonperformance,* or he may withdraw from the contract." Swiss-American Chamber of Commerce, *Swiss Contract Law, English Translation of Selected Official Texts* ¶ 107 at p. 35 (1977) (emphasis supplied).

The parties do not dispute that Chenax has elected to waive future performance and to seek damages for anticipatory breach of contract as provided in Article 107. Defendants also do not dispute, and this Court expressly finds, that the acts complained of by Chenax constitute an anticipatory breach by defendants of the Chenax cement contract under Swiss law for the reason set forth previously. See discussion regarding anticipatory breach of contract under New York law. Defendants do contend, however, that Chenax must prove that it was able to perform the contract and that it must prove damages as provided in the Swiss Code of Obligations. The Court notes that with respect to the issue of liability, defendants' expert witness testified during the trial of this action that "[i]t would be sufficient to prove that [Chenax] had the possibility to have [the cement] delivered." Trial Transcript at p. 1232. Chenax has not disputed this testimony. Therefore, it appears that under Swiss law, Chenax must prove that it could have performed its obligations under the cement contract in dispute. This burden of proof is apparently equivalent to the burden of proof required under New York law in actions for anticipatory breach of contract.

The Court finds the evidence submitted at trial insufficient to support the conclusion that Chenax was ready, willing, and able to fulfill its contractual obligations. Chenax has failed to produce sufficient credible evidence which demonstrates that it had entered into a subcontract with Cementos Especiales under which Cementos Ecpeciales was obligated to provide Chenax with the cement it required or that Cementos Especiales had the capacity to produce the requisite quantity of cement. None of the documents submitted at trial regarding the capacity and production of cement in Europe indicates the amount of unused capacity of Cementos Especiales to produce cement in 1975 and 1976. Furthermore, although Chenax contends that it could also have obtained 200,000 metric tons of cement from an Italian factory at a price which was lower than the price allegedly offered by Cementos Especiales, the evidence submitted in this regard is insufficient to support the allegation that such an offer was in fact extended to Chenax. The Court notes that Chenax's representative who testified at trial concerning this alleged offer, Dr. Akuba, could not identify the Italian cement factory involved. Accordingly, the Court finds that Chenax has failed to demonstrate that it was able to perform its obligations under the terms of the contract in controversy.[10]

---

10. The Court has already determined that sufficient cement was in fact available in Spain and other European countries during the period 1975-1976 to enable all three plaintiffs, including Chenax, to fulfill their contractual obligations to Nigeria. Nevertheless, the credible evidence does not demonstrate that Chenax intended to and was otherwise capable of performing under its contract. Whereas Nikkei and East Europe had obtained subcontracts with cement suppliers, Chenax has failed to demonstrate that it intended to and was

(footnote continued on next page)

Demurrage

Each plaintiff has also claimed damages for lost profits on demurrage. They each contend that their respective contracts were bargained for with an explicit expectation of profit on demurrage. However, since Nikkei's subcontract with Productos Fontanet provided that Productos Fontanet would receive demurrage not exceeding $4,100 per diem, the same demurrage rate provided in the underlying contract with Nigeria, it appears that Nikkei could not have obtained any profit from demurrage. Any demurrage which would have accrued would have been paid in total to Productos Fontanet rather than retained by Nikkei as profit.

Similarly, East Europe's subcontract with Intrafinsa provided that Intrafinsa would receive demurrage at a rate not exceeding $4,000 per diem. East Europe, therefore, could not have obtained a profit from demurrage for the same reason.

Moreover, even if these plaintiffs could have earned a profit because of a differential between the demurrage rates in their individual contracts with Nigeria and the demurrage rates in their respective subcontracts, estimating lost profits on demurrage for each of these plaintiffs

---

able to provide Nigeria with cement or that it had entered into a binding subcontract with a capable cement supplier. The only evidence which tends to support Chenax's contention that Chenax had an oral subcontract with Cementos Especiales is the hearsay evidence of Uche Akuba, Chenax's principal officer, director, and major shareholder. See Findings of Fact regarding Chenax's Performance Under Its Contract, supra. Having observed the demeanor of this witness and having reviewed the evidence submitted, this Court finds that Chenax has failed to demonstrate that it was ready, willing, and able to perform its contractual obligations.

could only be predicated upon unfounded speculation. If Nigeria had breached its cement contracts with all other suppliers except these plaintiffs and if all other suppliers accordingly ceased shipment of cement to Lagos immediately upon being notified, thereby relieving the port's congestion, plaintiffs would very likely have accumulated no demurrage. At the other extreme, if the congestion in the Nigerian ports continued indefinitely, plaintiffs could possibly have earned a significant amount of demurrage. Since estimation of demurrage herein involves unreasonable speculation, plaintiffs' claims regarding demurrage must be denied.

Incidental Damages

East Europe and Nikkei seek to recover incidental damages incurred as a result of defendant Nigeria's breaches of their respective contracts. Nikkei contends that it incurred a total of $5,000 in expenses in sending Ozawa to Nigeria to meet with the Nigerian negotiating committee. East Europe seeks to obtain costs it incurred as a result of the trip taken by Ross to meet with the Nigerian negotiating committee. East Europe also seeks to recover attorney's fees it incurred in connection with its claims for breach of contract.

Section 2-708 of the New York Uniform Commercial Code provides that in addition to lost profits a seller may recover incidental damages incurred as a result of the anticipatory breach of the contract by the buyer. Included in such recoverable incidental damages are "commercially reasonable charges, expenses or commissions incurred in

stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." N.Y.U.C.C. § 2-710 (McKinney 1964). The New York courts have given broad meaning to the phrase "reasonable charges, expenses or commissions" with the intent of putting the seller in as good a position as he would have been if performance would have been done. *Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017, 1024 (2d Cir. 1978). However, attorney's fees which were incurred as a result of or in connection with the prosecution of the seller's claim are not recoverable as incidental damages. *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 334 N.Y.S.2d 165, 285 N.E.2d 311 (1972).

It appears that the expenses incurred by East Europe and Nikkei in sending their respective representatives to meet with the Nigerian negotiating committee in October, 1975 and in February, 1976 were incurred as a result of Nigeria's suspension of importation of cement, and its refusal to accept delivery of cement, and CBN's unilateral amendment of the letters of credit. Accordingly these expenses may be recovered by East Europe and Nikkei as incidental damages. East Europe's claims for attorney's fees must be denied.

Punitive Damages and Interest

Finally, plaintiffs seek to recover punitive damages from Nigeria and CBN and to obtain interest under New York law. Under section 1-106 of the New York Uniform Commercial Code, "penal damages" may not be awarded "except as specifically provided in [the Code] or by other rule

of law." Plaintiffs contend that they are entitled to punitive damages since defendants maliciously breached their respective contracts. *Holodnak v. Avco Corp.*, 514 F.2d 285 (2d Cir. 1975), *cert. denied*, 423 U.S. 892, 96 S.Ct. 188, 46 L.Ed.2d 123 (1975). Even assuming that this Court may assess punitive damages for malicious breach of contract generally, plaintiffs have failed to demonstrate that defendants acted maliciously. Accordingly, the plaintiffs claims for punitive damages are dismissed.

Interest on an award for breach of contract may be recovered under New York law, N.Y. C.P.L.R. § 5001(a) (McKinney 1963), and is to be computed "from the earliest ascertainable date the Cause of action existed," id. § 5001 (b). Accordingly, this Court finds that Nikkei shall recover interest on its award of compensatory and incidental damages as of March 1, 1976, the median date of the twelve-month period during which Nikkei would have received payment for performance but for defendants' breach of contract. Similarly, East Europe shall recover interest on its award of damages as of April 1, 1976, the median date of the period during which it would have received payment.

Conclusions

1. Nikkei shall recover compensatory damages from Nigeria for lost profits on the sale of 231,500 metric tons of cement. The measure of lost profit per metric ton shall be the difference between the contract purchase price of $60 per metric ton and the subcontract supply price set forth in Nikkei's subcontract with Productos Fontanet. Alternatively, Nikkei may recover such sum from defendant

CBN for anticipatory repudiation of an irrevocable letter of credit.[11]

2. East Europe shall recover compensatory damages from Nigeria for lost profits on the sale of 240,000 metric tons of cement. Lost profits shall be assessed per metric ton at a rate equivalent to the difference between the contract purchase price of $59.50 and the subcontract supply price of $51.25 as set forth in its subcontract with Intrafinsa. Alternatively, East Europe, Nikkei may recover such sum from defendant CBN for anticipatory repudiation of an irrevocable letter of credit.

3. Chenax's claims for anticipatory breach of contract and anticipatory repudiation of the letter of credit are dismissed.

4. East Europe and Nikkei shall recover the expenses they each incurred in sending their representatives to meet with the Nigerian negotiating committee.

5. East Europe's claim for attorney's fees is denied.

6. Plaintiffs' claims for punitive damages are denied. Plaintiffs' claims for demurrage are dismissed.

7. Plaintiffs East Europe and Nikkei shall recover interest on their respective awards as provided herein.

Submit Judgments.

So Ordered.

---

11. Plaintiffs may not recover their lost profits twice, once under the cement contracts and again under the letters of credit. The letters of credit were merely the means by which plaintiffs were to be paid by Nigeria under the cement contracts.

Judgment of United States District Court in *Nikkei* Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. 77 Civ. 2348 (LWP)

#80,1055

DECOR BY NIKKEI INTERNATIONAL, INC.
d/b/a NIKKEI INTERNATIONAL, INC.,

Plaintiff,

against

FEDERAL REPUPLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

This action came on for trial before the Court, Honorable Lawrence W. Pierce, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that:

1. Plaintiff Decor by Nikkei International, Inc. d/b/a Nikkei International, Inc. recover of defendant Federal Republic of Nigeria the sum of One Million Eight Hundred Fifty-Seven Thousand Dollars ($1,857,000), with interest

thereon at the rate of six percent (6%) as provided by law from March 1, 1976, and its costs of action;

2. alternatively, plaintiff may recover such sum from defendant Central Bank of Nigeria.

Dated at New York, New York, this 10 day of Sept., 1980.

/s/ L. W. PIERCE
USDJ

JUDGMENT ENTERED 9/11/80

/s/ RAYMOUND F. BURGHARDT
Clerk

Judgment of United States District Court in *East Europe* Action

UNITED STAES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. 77 Civ. 2809 (LWP)

#80,1054

EAST EUROPE IMPORT-EXPORT, INC.,

Plaintiff,

against

FEDERAL REPUPLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,

Defendants.

This action came on for trial before the Court, Honorable Lawrence W. Pierce, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that:

1. Plaintiff East Europe Import-Export, Inc. recover of defendant Federal Republic of Nigeria the sum of One Million Nine Hundred Eighty-Six Thousand Dollars ($1,986,000), with interest thereon at the rate of six percent (6%) as provided by law from April 1, 1976, and its costs of action;

Judgment of United States District Court in East Europe Action

2. alternatively, plaintiff may recover such sum from defendant Central Bank of Nigeria.

Dated at New York, New York, this 10 day of Sept., 1980.

/s/ L. W. Pierce
USDJ

JUDGMENT ENTERED 9/11/80

/s/ Raymound F. Burghardt
Clerk

Opposition

Office - Supreme Court, U.S.
FILED
DEC 11 1981

No. 81-885

IN THE

Supreme Court of the United States

October Term, 1981

FEDERAL REPUBLIC OF NIGERIA and
CENTRAL BANK OF NIGERIA,
Petitioners,

—v.—

TEXAS TRADING & MILLING CORP., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

HILL, RIVKINS, CAREY, LOESBERG,
O'BRIEN & MULROY
Attorney for Respondent,
Texas Trading & Milling Corp.
72 Wall Street
New York, New York 10005
(212) 825-1000

LEWIS S. SANDLER, P.C.
Attorney for Respondent,
Decor by Nikkei International, Inc.,
d/b/a Nikkei International, Inc.
620 Fifth Avenue
New York, New York 10020
(212) 765-1010

BERTHOLD H. HOENIGER, P.C.
Attorney for Respondent,
East Europe Import-Export, Inc.
505 Park Avenue
New York, New York 10022
(212) 838-5324

Of Counsel:
ABRAM CHAYES
3 Hubbard Park Road
Cambridge, Massachusetts 02138

December 11, 1981

Question Presented

Was the Court of Appeals correct in concluding that the claims in suit arose out of a course of commercial conduct having substantial contacts with the United States, such that defendants were precluded by 28 U.S.C. § 1605(a)(2) from asserting sovereign immunity, where the transaction-related activities of defendants included:

- — issuing 17 letters of credit, totaling more than $265 million, payable only at Morgan Guaranty Trust Company (Morgan) in New York in satisfaction of their obligations under related commercial contracts for the purchase of cement;
- — providing funds for payments under the letters of credit to Morgan in New York;
- — repudiating the contracts by instructing Morgan to dishonor the letters of credit and to so notify the suppliers, which instructions Morgan carried out in New York;
- — consulting with Morgan on numerous aspects of the transactions (mostly by correspondence but also through visits by its officials to New York), including the credit ratings of particular suppliers, the terms of the contracts and letters of credit, amendments to the letters of credit, the form of the acts of repudiation, the New York counsel to be retained to defend against claims, and the settlement of claims?

TABLE OF CONTENTS

PAGE

Question Presented i

Counter-Statement of the Case 1

Reasons for Denying the Writ 2

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S. 682 (1976) 11

Arango v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) 10

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 11

Carey v. *National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979) 10

Frummer v. *Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851 (1967) 5

Gelfand v. *Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967) 5

Gemini Shipping, Inc. v. *Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981) 10

Hanson v. *Denkla*, 357 U.S. 235 (1958) 8, 9

Hispano American Mercantil S.A. v. *Central Bank of Nigeria*, [1979] 2 Lloyds L.R. 277 6

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 2, 8

J. Zeevi & Sons v. *Grindlays Bank (Uganda)*, 37 N.Y.2d 220, 333 N.E.2d 168 (1975) 8

PAGE

McGee v. *International Life Insurance Co.*, 355 U.S. 220 (1957) 9

Sugarman v. *Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980) 10

Thomas P. Gonzalez Corp. v. *Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) 9-10

Trendtex Trading Corp. v. *Central Bank of Nigeria*, [1977] 2 W.L.R. 356, [1977] 1 All E.R. 881 ... 6

Upton v. *Empire of Iran*, 607 F.2d 494 (D.C. Cir. 1979), *affirming without opinion*, 459 F. Supp. 264 (D.D.C. 1978) 10

Velidor v. *L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981) 8, 10

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 8, 9

Youssef M. Nada Establishment v. *Central Bank of Nigeria*, District Court Frankfurt, Aug. 25, 1976, *reproduced in* 16 Int'l Legal Materials 501 (1977) 6

Statutes:

28 U.S.C. § 1330 2

28 U.S.C. § 1605(a)(2) 3, 6, 8

Other Authorities:

Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction* in Kurland and Casper (eds.), 1980 The Supreme Court Review, p. 77 3

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* (1976) U.S. Code Cong. & Admin. News 6604 2

S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976) 2

Counter-Statement of the Case

In order to avoid unnecessary repetition, additional facts, not included in petitioners' *Statement of the Case*, are adduced in the discussion, *infra*, of *Reasons for Denying the Writ*. Record references are to the joint appendices in the consolidated cases below, copies of which have been lodged in this Court.*

Following the Second Circuit's denial of defendants' motion for a stay of its mandate pending petition for certiorari, defendants moved in this Court for such relief, and applied to Mr. Justice Marshall, and then to Mr. Justice Powell, for an interim stay. Both applications were denied. When defendants made the same application to Mr. Justice Rehnquist, the latter referred it to the full Court; and defendants thereupon withdrew their motion for a stay. Consequently, Nikkei's and East Europe's judgments have been paid in full by Morgan on behalf of defendants.

---

* Designations used are as follows:

C. ... a Consolidated Joint Appendix in *East Europe Import-Export Inc.* v. *Federal Republic of Nigeria*, Docket No. 80-7773; *Chenax Majesty, Inc.* v. *Federal Republic of Nigeria*, Docket No. 80-7771; *Decor by Nikkei International, Inc.* v. *Federal Republic of Nigeria*, Docket No. 80-7783.

V. ... a Joint Appendix, *Verlinden B.V.* v. *Central Bank of Nigeria*, Docket No. 80-7413.

Reasons for Denying the Writ

The Court of Appeals Correctly Applied 28 U.S.C. § 1605(a)(2) to the Complex Fact Situation Revealed by the Record in These Cases, under the Familiar Principles of International Shoe and Subsequent Decisions of This Court; Thus These Cases Present No Legal Issues of General Importance Appropriate for Review Here.

Plaintiffs below, respondents here, brought suit when defendant, Central Bank of Nigeria (CBN), at the behest of defendant, the Federal Republic of Nigeria (Nigeria), issued instructions to Morgan to refuse payment against shipping documents properly presented at Morgan's New York office under letters of credit issued by CBN through Morgan to pay for Nigeria's purchases of cement from plaintiffs.

Since Nigeria is a foreign state and CBN is an instrumentality of a foreign state, the cases were brought under the Foreign Sovereign Immunities Act (the Act). The Act grants subject matter and personal jurisdiction in claims against foreign sovereigns as to which they are not entitled to immunity under the substantive sections of the statute. 28 U.S.C. § 1330.

The Act, which was passed in 1976, draws on the concepts and methodology of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and subsequent cases defining the reach of state long-arm jurisdiction over nonresident defendants. H.R. Rep. p. 13.* The governing

---

* The reference is to H.R. Rep. No. 94-1487, 94th Cong., 2d. Sess. (1976), *reprinted in* (1976) U.S. Code Cong. & Admin. News 6604. The Senate Report, S. Rep. No. 94-1310, 94th Cong., 2d. Sess. (1976), is identical. To avoid duplication, citations herein are to the House Report only.

doctrines are elaborated in a rich body of case law with which the lower federal courts are thoroughly familiar.

The applicability of these concepts is evident in the language of 28 U.S.C. § 1605(a)(2), the relevant section of the Act in these cases, dealing with the unavailability of sovereign immunity in claims arising out of the commercial activity of foreign sovereigns. Despite petitioners' contrary contention (Petition, pp. 18-20), it is common ground that the section does not invoke "doing business" as a basis for "general jurisdiction" over claims against the foreign sovereign. Instead, it adopts the transactional or "special jurisdiction" approach: the contacts with the territory of the forum must relate to the transaction giving rise to the cause of action. See Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction* in Kurland and Casper (eds.), 1980 The Supreme Court Review, p. 77. Under § 1605(a)(2), immunity is precluded in suits based upon

— a commercial activity carried out in the United States by a foreign sovereign;

— an act performed in the United States in connection with a commercial activity of the foreign sovereign elsewhere; or

— an act performed outside the United States in connection with the commercial activity of the foreign sovereign elsewhere, but having a direct effect within this country.

It is the plaintiffs' contention that these three subclauses are designed to cover the entire range in which transactional jurisdiction can be constitutionally asserted over claims arising out of commercial activity of a nonresident defendant. But whether this view of the statute is adopted, or whether each subclause of § 1605(a)(2) is taken as a separate and limited category, the Court of Appeals was plainly right in finding that the requirements of the statute were satisfied in these cases.

The contracts here in suit were part of a major program by which Nigeria undertook to purchase over 16 million metric tons of cement. (V. 189a). In late 1974 and early 1975, it signed 109 separate contracts on mimeographed forms prepared by it, with an aggregate purchase price of almost $1 billion. (*Ibid.*; V. 65a). Payment was to be made under irrevocable letters of credit to be confirmed through a bank designated by the supplier. (*E.g.*, V. 66a).

Nigeria refused to provide the letters of credit as called for by the contracts. Instead, it ordered CBN to issue "irrevocable" *unconfirmed* letters of credit, payable through banks of its choice. (*E.g.*, V. 59a). For 14 suppliers, including these respondents, the bank chosen by CBN was Morgan, which had not been designated by any of the respondents in their original contracts. By these changes, which were made by defendants for their own purposes and acquiesced in by plaintiffs, Nigeria made New York the place of payment, the only performance required of Nigeria under the contracts, and established New York law as the law governing that performance.

Morgan was and is Nigeria's principal banker in the United States and CBN's sole commercial correspondent bank in this country. (C. 359a, 507a). Although defendants assert that Morgan performed no activities on defendants' behalf in connection with the cement transactions other than advice of the credits to the beneficiaries and payment (Petition, pp. 6-7), the record reveals otherwise. Such actions are chargeable to defendants in determining whether sufficient contacts exist for the assertion of jurisdiction.*

---

* Morgan's employees testified that the relation between defendants and Morgan was one of principal and agent. (C. 366a, 400a.) In any event, a formal agency relationship is not

[Footnote continued on following page]

In addition to the three credits with plaintiffs, Morgan advised or confirmed 14 other letters of credit, most of them with U.S. suppliers, in an aggregate amount of over $265 million. (C. 485a; V. 286a). This enormous volume of letter of credit business resulted in a maze of complex transactions in which Morgan was pivotally involved. At the outset, CBN enlisted the aid of Morgan in persuading plaintiffs and other suppliers to accept the changed contract terms. (V. 179a). Morgan provided credit information on at least two of the six plaintiffs below. It advised Nigeria on certain terms of the transaction, including the wording of the letters of credit (C. 314a-315a), warning at one point that the demurrage provisions were dangerously open-ended.

While the letters of credit were in force, Morgan, under CBN's authorization, drew on the funds of CBN and Nigeria on deposit with it and with the Federal Reserve Bank of New York to make payments under the letters of credit. (V. 59a). Frequent amendments to the letters of credit, requested by suppliers, were effected through Morgan. (*E.g.*, V. 155a).

When the port congestion that ultimately led to the repudiation of the contracts began to develop, Nigeria consulted with Morgan in New York on the dimensions of the problem and possible remedies. (*E.g.*, C. 458a-462a). In the end, repudiation was accomplished by instructions transmitted to and carried out by Morgan in New York. (C. 180a). Thereafter Morgan suggested that defendants should promulgate a shipping decree to create a colorable basis for an act of state claim. (C. 318a). It advised defendants to retain New York counsel and ultimately referred them to the firm now represent-

---

required under the cases as long as the acts in question were performed on defendants' behalf. *Frummer* v. *Hilton Hotels Int'l. Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851 (1967); *Gelfand* v. *Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967).

ing them. (C. 472a, 526a; 465a-466a). Morgan's own legal department advised CBN of the possible consequences of its acts (C. 425a), and that defendants "could do serious damage to their international credit rating" by dishonoring the letters of credit. (C. 318a). It assisted Nigeria in explicating its policy to the U.S. financial community (C. 329a-337a; 478a-479a), and in the settlement of some 44 claims, including many not otherwise connected with the United States. (C. 320a).

All this adds up to simply an enormous volume of transaction-related activity carried out by or on behalf of defendants in the United States. It is hard to understand a claim that these contacts are insufficient to support jurisdiction. In almost identical situations, both the British and the German courts have unhesitatingly asserted jurisdiction over claims arising out of the Nigerian cement purchase program. *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] 2 W.L.R. 356, [1977] 1 All E.R. 881; *Youssef M. Nada Establishment* v. *Central Bank of Nigeria*, District Court Frankfurt, Aug. 25, 1976, *reproduced in* 16 Int'l Legal Materials 501 (1977). As Lord Justice Denning said in *Trendtex*,

> The letter of credit was issued in London through a London bank in the ordinary course of commercial dealings. It is completely within the territorial jurisdiction of our courts. [1977] 1 All E.R. at 893.

To the same effect see *Hispano American Mercantil S.A.* v. *Central Bank of Nigeria*, [1979] 2 Lloyds L.R. 277.

Similarly, each of the separate subclauses of § 1605 (a)(2) is readily satisfied. The cement purchase program was undeniably a course of commercial conduct. It was carried on at least in part in the United States through the activities of Morgan on behalf of defendants in aid of and in administering the program. According to the House Report on the Act,

> a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction having "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States. (H.R. Rep., p. 17.)

In the instant cases, of course, defendants' entire performance under the contract—payment—was to take place, at their own instance, in the United States, subject to American law.

By the same token, defendants acted in the United States in connection with their commercial activity outside the United States when they established Morgan as the place of payment under the letters of credit, instructed Morgan to draw on defendants' U.S. funds for payments, and later refused, through Morgan, to make payment against shipping documents properly presented.

Finally, defendants' acts of repudiation in Nigeria had direct effects in the United States. As a consequence of these acts, both the legal and practical situation of plaintiffs were dramatically altered. Defendants misunderstand the decision below as well as plaintiffs' position on the issue of direct effect. We do not contend that the mere fact of financial injury to a U.S. corporation resulting from the breach would satisfy the statute, nor did the Court of Appeals so read it. Rather, we look to the actual changes in legal relationships in the United States as a result of defendants' repudiation, and to the practical consequences to plaintiffs. Prior to the repudiation, plaintiffs could obtain immediate payment in New York by presenting shipping documents to Morgan. Thereafter, they could not. Defendants' action made "New York . . . the locus of repudiation, whereas it should have been

[the] site of payment." *J. Zeevi & Sons* v. *Grindlays Bank (Uganda)*, 37 N.Y.2d 220, 226, 333 N.E.2d 168, 172 (1975). In so doing they created a cause of action in New York in favor of plaintiffs. *Ibid;* and see *Velidor* v. *L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981) (defendant's refusal to pay foreign seaman in U.S. port gives rise to a cause of action in the United States under Seaman's Wage Act and is sufficient to satisfy § 1605(a)(2)). Defendants' acts terminated Morgan's authorization to draw against defendants' funds in its own bank and in the Federal Reserve Bank of New York for payments under the letters of credit. And it converted plaintiffs' absolute right and power to obtain payment against shipping documents in New York into a legal claim enforceable only by protracted litigation against a distant sovereign and its central bank.

The array of defendants' contacts with the United States in connection with the cement purchase program "are such that maintenance of [these] suits does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington, supra*, at 316. The elements of the *International Shoe* doctrine as subsequently elaborated are abundantly satisfied.

— By insisting, contrary to the provisions of the contracts, that Morgan in New York should be the place of payment, defendants "purposely availed [themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denkla*, 357 U.S. 235, 253 (1958).

— The volume of purchases from American suppliers, administered and payable through Morgan in New York, was such that defendants "could reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Indeed,

Morgan actually did foresee that probability and warned defendants against it.

— As in *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957), the United States here "has a manifest interest in providing effective means of redress for its residents . . ." and has moved expressly to vindicate that interest by passing the Act. See *Hanson* v. *Denkla*, *supra*, at 252 (1958).

— Finally, the United States is by no means an inconvenient forum for defendants. Nigeria carries on a wide range of other commercial activities in the United States, apart from the cement contracts. High officials of defendants are frequent visitors here and procure U.S. legal and financial services of the highest quality. Documentary evidence relating to the defendants' performance under the contracts is concentrated here. Hence, it is wholly appropriate under traditional notions of fair play and substantial justice to require defendants to answer for their wrongful conduct in a U.S. forum. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 291-92.

There is no conflict with the Ninth Circuit's decision in *Thomas P. Gonzalez Corp.* v. *Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980). As the court in that case recognized, the application of the due process standard "depends on the facts of each case." 614 F.2d at 1251. In *Gonzalez*, no letter of credit had been established; defendant withdrew from the contract before the time came for that. The contract itself did not expressly contemplate "payment through a California bank," nor was Crocker Bank selected as the paying bank by defendant. Such contacts as defendant had with the forum were tangential at best, and included "neither

property nor an agent . . ." nor a "continuous course of business" within the forum; and, most significant, "were unrelated to [plaintiff's] present claim." 614 F.2d at 1249, 1254. Crocker's intended role in the transaction appears to have been simply that of a passive conduit for payment. There is nothing like the thick texture of activity by Morgan in aid and on behalf of defendants' course of comercial conduct that was shown in this case.

On its record, *Gonzalez* simply represents the proper application of the statute to the variant fact pattern there presented. So also do the decisions in *Velidor* v. *L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981); *Gemini Shipping, Inc.* v. *Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981); *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980); *Sugarman* v. *Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980); *Upton* v. *Empire of Iran*, 607 F.2d 494 (D.C. Cir. 1979), *affirming without opinion*, 459 F. Supp. 264 (D.D.C. 1978); *Carey* v. *National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979). All are straightforward applications of the statute. None of them evince any confusion or misunderstanding of the language of the Act or the principles that should govern its application by courts of first instance.

In a last effort to raise an issue that might justify this Court's consideration, defendants erroneously suggest that adjudication here is barred by the act of state doctrine. Even if it is accepted that the Nigerian decree closing the ports was an act of state, it was issued on December 19, 1975, almost three months after the September 30 repudiation. Moreover, the repudiation of the contracts and the dishonor of the letters of credit were in no sense necessary consequences of the port closing. Defendants could have sought to stretch out deliveries, renegotiate the contracts or settle their liabilities—and in fact they initially pursued all of these courses. Their decision to repudiate was an independent commercial act.

Finally, to apply the act of state doctrine to defendants' repudiation of their payment obligations in the United States would be to give extraterritorial effect to defendants' action, a result that is prohibited by the doctrine itself. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976).

CONCLUSION

These cases present no legal issues of general importance requiring the attention of this Court, and the petition for certiorari should be denied.